A

TITULAR ROMAN CATHOLIC ARCHBISHOP OF KUALA LUMPUR

v.

B

MENTERI DALAM NEGERI & ORS

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
RAUS SHARIF PCA
ZULKEFLI MAKINUDIN CJ (MALAYA)
C RICHARD MALANJUM CJ (SABAH & SARAWAK)
SURIYADI HALIM OMAR FCJ
ZAINUN ALI FCJ
JEFFREY TAN FCJ
[CIVIL APPLICATION NO: 08-690-11-2013]
D 23 JUNE 2014
[2014] CLJ JT(6)

CIVIL PROCEDURE: *Appeal - Leave - Leave to appeal to Federal Court - Minister imposing condition barring applicant from using word "Allah" in newsletter - Court of Appeal overruling High Court and*
E *disallowed judicial review of Minister's decision - Whether Minister's decision reasonable, constitutional and in accordance with law - Whether Court of Appeal applied correct test - Whether questions posed to Federal Court met threshold of s. 96(a) or (b) Courts of Judicature Act 1964*

F

ADMINISTRATIVE LAW: *Judicial review - Applicable test - Whether the objective test - Whether open for reviewing court now to question the process as well as substance of decision - Minister imposing condition barring applicant from using word "Allah" in newsletter - Exercise of*
G *discretion by Minister - Whether reasonable, constitutional and in accordance with law - Federal Constitution, arts. 3, 10, 11, 12 - Printing Presses and Publications Act 1984, ss. 6, 12*

CONSTITUTIONAL LAW: *Legislation - Validity and constitutionality - Control and Restriction of the Propagation of Non-Islamic Religions*
H *Enactment, s. 9 - Proceedings by individual to declare law as invalid on ground that legislature had no power to make such law - Whether could only be commenced with leave of judge of Federal Court - Challenge to validity of law made in judicial review proceedings in High Court without leave - Whether incompetent - Decision of High Court invalidating the*
I *law - Whether rightly set aside by Court of Appeal - Federal Constitution, arts. 4(3), (4)*

This was an application for leave to appeal against the decision of the Court of Appeal in overruling the High Court and ruling that the first respondent ('the Minister'), in prohibiting the applicant from using the word "Allah" in the Malay version of its weekly publication ('the Herald') on grounds of public order or national security ('the Minister's decision'), was acting *intra vires* the law and the Federal Constitution ('the Constitution'), and further, had not transgressed the rules of natural justice and fairness nor violated the *Wednesbury* principle of reasonableness or the principles of illegality, proportionality and irrationality. The facts showed that following the prohibition, the applicant applied *inter alia* for an order of *certiorari* to quash the Minister's decision. The learned High Court Judge, upon appraising the provisions of the Constitution and the relevant statutes, ruled that the Minister's decision was illegal and unconstitutional, and so granted the orders and declarations sought for. Further, it was the view of the learned judge, in quashing the Minister's decision, that the applicant had a constitutional right to use the word "Allah" pursuant to arts. 3(1), 10, 11 and 12 of the Constitution, and that, s. 9 of the Control and Restriction of the Propagation of Non-Islamic Religions Enactments of the States ('the impugned provision'), which effectively prohibited the use of the word "Allah" to "express or describe any fact, belief, idea, concept, act, activity, matter or thing of or pertaining to any non-Islamic religion", when read with art. 11(4) of the Constitution, was disproportionate to its objectives and was therefore arbitrary and unconstitutional. On appeal, the orders and findings of the High Court were however set aside by the Court of Appeal, principally on the ground that, on the facts and in the circumstances of the case, there was no plausible reason for the High Court judge to exercise her judicial review jurisdiction and interfere with the Minister's decision. The Minister's decision to impose a condition on the Herald, according to the judges of the Court of Appeal, came squarely within the function and statutory powers of the Minister, and was *intra vires* the Constitution, the Printing Presses and Publications Act 1984 ('the Act') or the Rules made thereunder. The applicant sought leave to appeal to the Federal Court and in the event posed a total of 28 legal questions, categorised as Administrative Law Questions (Part A), Constitutional Law Questions (Part B) and General Questions (Part C), for the due consideration of the apex court ('encl. 2(a)').

In consequence, arguments were *inter alia* raised that leave ought to be granted as: (i) there was uncertainty as to the source of power under which the Minister imposed the conditions and prohibition in question; (ii) the Court of Appeal, in determining the reasonableness of the Minister's decision, had applied the wrong subjective test instead of the objective test; and (iii) the questions and issues posed to the Federal Court herein had passed the threshold of s. 96(a) or (b) of the Courts of Judicature Act 1964 ('CJA').

Held (dismissing application; refusing leave)
Per Arifin Zakaria CJ (for the majority):

(1) The court would agree with the applicant that the law on judicial review has advanced from the subjective test to that of the objective test. It is therefore trite that the test applicable in judicial review now is the objective test. (para 27)

(2) In considering whether the Court of Appeal had applied the correct test, it is pertinent to consider the whole body of the judgments of the learned judges of the Court of Appeal and not by merely looking at the terms used in the judgments. (para 28)

(3) Even though Apandi Ali JCA had used the term "subjectively objective" in his judgment, he however referred to the case of *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* which clearly propounded the objective test. Apandi Ali JCA had also applied the principle of reasonableness as established in *Associated Picture Houses Ltd v. Wednesbury Corporation* and *Council of Civil Service Unions & Ors v. Minister of Civil Service*, and more, the principle of proportionality when he opined "when such exercise of discretion by the Minister becomes a subject of a judicial review, it is the duty of the court to execute a balancing exercise between the requirement of national security and public order with that of the interest and freedom of the respondent. As a general principle, as decided by case law, the courts will give great weight to the views of the executive on matters of national security". Likewise, Abdul Aziz Rahim JCA, while speaking of subjective test, had nonetheless considered at length the reasons

furnished by the Minister in arriving at his decision before concluding that the Minister had exercised his discretion reasonably. Clearly, therefore, the Court of Appeal had applied the objective test in arriving at its decision. Had it applied the subjective test, it would not be necessary for it to consider the substance of the Minister's decision. (paras 28–33)

(4) Since the Court of Appeal had applied the correct test, it is not open for this court to interfere with its decision. Even if this court does not agree with the findings of the Court of Appeal, that is not sufficient reason for this court to interfere. That being so, the questions of law posed in Part A failed the threshold under s. 96(a) of the CJA. (paras 34 & 35)

(5) Clause 3 of art. 4 of the Constitution provides that the validity of any law made by Parliament or a State legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings, one of which is "in proceedings for a declaration that the law is invalid on that ground", in which case the Federation or the State is entitled to be a party to such proceedings. Clause (4) of art. 4 on the other hand provides that such proceedings may not be commenced by an individual without leave of a judge of the Federal Court. Consequently, the party seeking to challenge the validity or the constitutionality of the impugned provision must specifically ask for a declaration that the law is invalid, and such a proceeding may only be commenced with leave of a judge of the Federal Court. Further, the respective State must be made party so as to give the State an opportunity to defend the validity or constitutionality of the impugned provision. (para 40)

(6) The effect of cls. (3) and (4) of art. 4 of the Constitution, as explained by the Supreme Court in *Abdul Karim bin Abdul Ghani v. The Legislative Assembly of the State of Sabah*, is that the validity or constitutionality of the laws could not be questioned by way of collateral attack as was done in the present case. It follows that the High Court Judge, for reasons of procedural non-compliance and want of jurisdiction, ought not to have entertained the challenge on the validity or

constitutionality of the impugned provision. It follows further that the findings of the High Court Judge that the impugned provision was arbitrary and unconstitutional was rightly set aside by the Court of Appeal. (paras 42 & 43)

(7) The constitutional questions posed in Part B of this application, which relate to the usage of the word "Allah" in the Herald, concern the rights as guaranteed by arts. 3, 8, 10, 11 and 12 of the Constitution. These questions could not be considered in isolation without taking into consideration the impugned provision. However, as it is this court's finding that a challenge on the validity and unconstitutionality of the impugned provision could not be made for the reasons stated, it is therefore not open for this court to consider the questions posed in Part B. (para 44)

(8) The questions in Part C relate to theological issues arising directly from the judgments of the learned judges of the Court of Appeal. From the facts, it is clear that the Minister's decision was never premised on theological consideration. It follows therefore that the views expressed by the judges of the Court of Appeal on those issues are mere *obiter*. It follows further that the questions in Part C do not pass the threshold under s. 96(a) of the CJA. (para 45)

Per Richard Malanjum CJ (Sabah & Sarawak) (dissenting):

(1) The applicant has satisfied the requirements of s. 96(a) and (b) of the CJA. Accordingly, leave to appeal should be granted on all the proposed questions in Part A, B and C as prayed for in encl. 2(a). (para 119)

(2) There is merit in the applicant's submission on the source of power of the Minister in stipulating the conditions. It is an important point to be considered by this court in order to clear the uncertainty since even the judges of the Court of Appeal were diverged. Accordingly, leave should be granted on this point under the proposed question 5 of Part A. (para 86)

(3) There are divergent views too in the decisions of the Court of Appeal on the scope and nature of power of the Minister under the Act (see *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia) and Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors*). Surely

such divergence of views requires this court to clear the confusion as to the correct test applicable in the exercise of power by the Minister under the Act, *ie*, whether it is the subjective or objective test or a fusion of the two. More so when in the present case, the phrase "subjectively objective" was also used in considering the impugned decision. Hence, leave should be granted on proposed questions 1, 2, 3, 5, 9 and 10 of Part A. (paras 87–95)

(4) Taking into consideration the undisputed fact that the Herald had been in circulation for the past 14 years before the imposition of the Minister's decision and that there was no evidence shown of prejudice to public order during that period, and further that the use of the word "Allah" was not prohibited in other publications such as Al-Kitab and the Sikh Holy Book, there is a serious issue in the exercise of the discretion by the Minister. The proposed questions 6, 7 and 8 of Part A cover this issue and leave should be granted as well. (para 97)

(5) Public order and national security are not synonymous and yet the Court of Appeal appeared to have used the two terms interchangeably. There is therefore a need for this court to determine whether to distinguish them or link them together. Further, in respect of these terms, as the applicant and the respondents were at odds as to the approach to be used, whether it is the subjective test or the objective test, an opportunity arises for this court to determine once and for all the direction of the law that deals with exercise of discretionary power by the Executive. Leave should therefore be given in respect of questions 2, 3, 4 and 5 of Part A which cover this point. (paras 98 & 105)

(6) There are merits in the applicant's submission that the Minister's decision as upheld by the Court of Appeal contravened arts. 11(1) and (3) of the Constitution and curtailed the rights of the Bahasa Malaysia speaking Christians from Sabah and Sarawak, or that the interpretation by the Court of Appeal of some key Articles in the Constitution would lead to art. 3(1) taking precedence over the other Articles and derogate arts. 3(4), 11(1) and 11(4) of the Constitution and was contrary to documentary evidence on

A the formation of the Federation as a secular State. Further, on the test of "essential and integral part of religion" so adopted by the Court of Appeal, there is no reason why the rights under art. 11 of the Constitution should be confined to those essential and integral part or core of the religion. Unless
B further determined by this court, such interpretations of the relevant Articles by the Court of Appeal would have to be accepted as correct, the law and binding upon the courts below and the citizenry of the Federation. As such it is only appropriate that leave should be granted on the proposed
C questions in Part B as they have met the requirement of s. 96(b) of the CJA. (paras 108–114)

(7) There is merit in the applicant's submission that the proposed questions in Part C – on the appropriateness of the learned
D judges of the Court of Appeal in conducting their own research *via* the internet and relying on the same to substantiate their judgments – came within the purview of s. 96(a) CJA. These are novel points and further argument on them is important and of public advantage. Accordingly, leave
E should be granted on the proposed questions in Part C. (paras 116–118)

Per Zainun Ali FCJ (dissenting):

(1) There seems to be some uncertainty with regard to the source
F of power issue. The Minister himself was reticent as to its source while the Court of Appeal was divergent. Given the uncertainty, it is important that the source of power be clarified and settled in terms by this court. (paras 154 & 159)

G **(2)** In judicial review cases, the Malaysian courts have long moved on from permitting review only of the process to reviewing both the process and substance in determining the reasonableness of a decision of a public authority. The divergent approaches made by the Court of Appeal on this
H issue ought to be addressed by this court. Leave should also be granted for the reason that the decision of the Court of Appeal below is at variance with the earlier decision of the Court of Appeal in *Dato' Seri Syed Hamid Syed Albar v. Sisters in Islam* in dealing with the same provision of the Act.
I (one applying the "subjectively objective" test while the other the "objective test"). (paras 161-163)

(3) A scrutiny of the lead judgment of the Court of Appeal showed that the Court of Appeal had primarily applied the subjective test. His Lordship was in agreement with the decision in *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors*, which, although it used the subjective test had suggested a fusion of tests in its approach. However, the learned judge went on to say that the appraisal of the facts was done by way of it being "subjectively objective" and that it was in line with the rationale in *Darma Suria v. Menteri Dalam Negeri*. But *Arumugam* clearly opted for the subjective/objective test whilst *Darma Suria* applied the objective test in full force. The term "subjectively objective" is also paradoxical, being two different concepts which negate one another. If, however, the claim is that the Court of Appeal had in fact applied the objective test even though it had attached a "subjective objective" label to define it, that would only cause further confusion. The confusion can only be straightened out when parties are given the opportunity to submit if leave is granted. (paras 210–220)

(4) Even if cases involving national security and public order are within the Minister's purview, the Minister's exercise of power is not completely beyond the court's competence. It is incumbent for the Minister to give reasons or offer evidence that the exercise of power is legal and reasonable. In this case, the applicant's grounds spoke mainly of violation of its constitutional and legal rights. Consequently, a question arises as to whether the Minister had applied procedural and substantive fairness and acted with proportionality and exercised his discretion within the statutory purpose of the Act. A need therefore arises for this court to clarify them in a proper forum such that the merits will have their time of day. (paras 223, 230–235)

(5) The issues which have come up for consideration in this application are of public importance within the meaning of s. 96(a) CJA. A decision on these issues where this court reviews the judgment of the Court for Appeal for their correctness on every aspect would surely be momentous and would be to great public advantage. (paras 236 & 237)

(6) I shall refrain from answering the questions raised in Part B as the questions in Part A themselves offer enough justification for leave to be granted under s. 96(a) of the CJA. (para 243)

(7) As for the questions in Part C, the learned judges in the court below ought to have confined themselves strictly to the legal issues raised, since the question of the truth or otherwise of the disputed tenets of religious belief and faith, the correctness or otherwise of religious practices etc, are beyond the competence of judges of fact and law, as we are. The questions are clearly non-justiciable. Likewise, the alleged historical or other facts taken from affidavit evidence and the internet are in themselves unverified, uncorroborated and therefore inadmissible. Thus, leave should be granted for the questions in Part C under s. 96(a) for it would be to public advantage that the issues are ventilated and the matter placed in their correct and proper perspectives for purposes of future guidance. (paras 244–249)

Per Jeffrey Tan FCJ (dissenting):

(1) The task of this court, in relation to the instant application for leave to appeal, is only to find if the prerequisites of sub-s. (a) or (b) of s. 96 CJA have been met. The task of this court is no more involved than that. There should not be a rush to judgment of the issues and its merits, which, in this case, have yet to be canvassed and argued. (para 258)

(2) It is evident that at each and every stage that condition (i) (*ie*, the Minister's decision) had been considered and then reviewed, by the Minister who imposed it, by the High Court who set it aside, and by the Court of Appeal who upheld condition (i), there were questions/issues on the constitutionality of condition (i). It is equally evident that those constitutional questions/issues were either defended or justified by the Minister and answered by the courts on the basis of the provisions of the Constitution and its effect. The High Court and the Court of Appeal might have reached different results. But it remains all the same that those were clearly decisions by the courts below on the effect of the provisions of the Constitution. Section 96(b) CJA has only one prerequisite, namely "from any decision as to the effect of any provision of

the Constitution including the validity of any written law relating to any such provision". It is plain and obvious that the sole prerequisite of s. 96(b) has been satisfied. (para 265)

(3) The constitutional questions should be answered by the Federal Court. They are too grave to be answered by any other. Leave should be granted for the constitutionality of condition (i) to be raised in an appeal to the Federal Court. (para 266)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah permohonan kebenaran untuk merayu terhadap keputusan Mahkamah Rayuan kerana mengakas Mahkamah Tinggi dan memutuskan bahawa responden pertama ('Menteri'), dalam melarang pemohon dari menggunakan kalimah "Allah" dalam penerbitan mingguan versi Bahasa Melayu pemohon ('the Herald') atas alasan ketenteraman dan keselamatan awam ('keputusan Menteri'), telah bertindak secara *intra vires* undang-undang dan Perlembagaan Persekutuan ('Perlembagaan'), dan selanjutnya, secara yang tidak melanggar kaedah-kaedah keadilan asasi, prinsip kemunasabahan *Wednesbury* mahupun prinsip-prinsip ketidaksahan, ketidaksepadanan dan ketidakrasionalan. Fakta menunjukkan bahawa ekoran larangan yang dikenakan, pemohon telah memohon antara lain untuk satu perintah *certiorari* bagi membatalkan keputusan Menteri. Yang arif Hakim Mahkamah Tinggi, setelah meneliti peruntukan-peruntukan Perlembagaan dan statut yang relevan, memutuskan bahawa keputusan Menteri adalah tak sah dan tidak berperlembagaan, dan dengan itu membenarkan perintah dan deklarasi yang dipohon. Selanjutnya, menjadi pandangan yang arif hakim, dalam membatalkan keputusan Menteri, bahawa pemohon mempunyai hak keperlembagaan untuk menggunakan kalimah "Allah" di bawah fasal 3(1), 10, 11 dan 12 Perlembagaan, dan bahawa, s. 9 Enakmen Negeri-Negeri, iaitu Enakmen Kawalan dan Sekatan Pengembangan Agama Bukan Islam ('peruntukan yang dicabar'), yang melarang penggunaan kalimah "Allah" untuk "menyatakan atau memperihal apa-apa fakta, kepercayaan, idea, konsep, perbuatan, aktiviti, perkara atau benda mengenai atau yang berkaitan dengan agama bukan Islam", bila dibaca bersama fasal 11(4) Perlembagaan, adalah tidak berpadanan dengan tujuannya dan dengan itu adalah arbitrari dan tidak berperlembagaan. Di rayuan, perintah-perintah dan dapatan-dapatan Mahkamah

Tinggi bagaimanapun telah diakas oleh Mahkamah Rayuan, secara pentingnya atas alasan bahawa, berdasarkan fakta dan halkeadaan kes, tidak wujud apa-apa alasan untuk Mahkamah Tinggi melaksanakan bidang kuasa semakan kehakimannya dan mengganggu keputusan Menteri. Keputusan Menteri untuk mengenakan syarat terhadap the Herald, menurut yang arif Hakim-hakim Mahkamah Rayuan, adalah terangkum sepenuhnya di bawah tugas dan kuasa statutori Menteri, dan adalah *intra vires* Perlembagaan, Akta Mesin Cetak dan Penerbitan 1984 ('Akta') serta Peraturan-Peraturan yang dibuat di bawahnya. Pemohon memohon kepada Mahkamah Persekutuan untuk kebenaran merayu dan berikutnya mengemukakan sejumlah 28 persoalan undang-undang, yang dikategorikan sebagai Persoalan Undang-Undang Pentadbiran (Bahagian A), Persoalan Undang-Undang Perlembagaan (Bahagian B) dan Persoalan Am (Bahagian C), untuk pertimbangan mahkamah tertinggi ('lampiran 2(a)'). Berikutnya juga, hujah-hujah telah antara lain dikemukakan bahawa kebenaran merayu harus diberi kerana: (i) wujud ketidaktentuan tentang sumber kuasa yang digunakan oleh Menteri dalam mengenakan syarat dan larangan berkenaan; (ii) Mahkamah Rayuan, dalam memutuskan kemunasabahan keputusan Menteri, telah menggunapakai ujian yang salah, iaitu ujian subjektif berbanding ujian objektif; dan (iii) persoalan dan isu-isu yang dibangkitkan di hadapan Mahkamah Persekutuan di sini telah melepasi syarat puncak s. 96(a) atau (b) Akta Mahkamah Kehakiman 1964 ('AMK').

Diputuskan (menolak permohonan; tidak memberi rayuan) Oleh Arifin Zakaria KHN (keputusan majoriti):

(1) Mahkamah bersetuju dengan pemohon bahawa undang-undang mengenai semakan kehakiman telah berkembang dari ujian subjektif kepada ujian objektif. Adalah jelas bahawa ujian yang terpakai bagi semakan kehakiman kini adalah ujian objektif.

(2) Dalam menimbang sama ada Mahkamah Rayuan telah menggunapakai ujian yang betul, apa yang harus dilihat adalah keseluruhan teks penghakiman yang arif hakim-hakim dan bukan semata-mata terma-terma yang digunakan di dalam penghakiman.

(3) Walaupun Apandi Ali HMR menggunakan terma "subjectively objective" dalam penghakimannya, beliau bagaimanapun telah merujuk kepada kes *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* yang jelas mengutarakan ujian

objektif. Apandi Ali HMR juga telah menggunapakai prinsip kemunasabahan seperti yang diputuskan oleh *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* dan *Council of Civil Service Unions & Ors v. Minister of Civil Service*, dan lebih dari itu, prinsip kesepadanan bila beliau berkata "apabila pelaksanaan budibicara oleh Menteri sedemikian menjadi halperkara semakan kehakiman, maka menjadi tugas mahkamah untuk untuk melakukan pengimbangan di antara kehendak ketenteraman dan keselamatan awam dengan kepentingan dan kebebasan responden. Sebagai satu prinsip am, seperti yang diputuskan oleh undang-undang kes, mahkamah akan memberikan penekanan yang berat kepada pandangan-pandangan pihak eksekutif berhubung perkara-perkara keselamatan awam". Begitu juga, Abdul Aziz Rahim HMR, walaupun bercakap mengenai ujian subjektif, telah menimbang dengan panjang lebar alasan-alasan yang diberikan oleh Menteri dalam membuat keputusannya sebelum merumuskan bahawa Menteri telah melaksanakan budibicaranya secara yang munasabah. Dengan itu, jelas bahawa Mahkamah Rayuan telah menggunakan ujian objektif dalam mencapai keputusannya. Sekiranya ia menggunapakai ujian subjektif, maka tentulah tidak perlu baginya untuk menimbang intipati keputusan Menteri.

(4) Oleh kerana Mahkamah Rayuan telah menggunapakai ujian yang betul, maka adalah tidak terbuka bagi mahkamah ini untuk mengganggu keputusannya. Jika sekalipun mahkamah ini tidak bersetuju dengan dapatan-dapatan Mahkamah Rayuan, itu tidak mencukupi untuk mahkamah ini campur tangan. Oleh hal yang demikian, persoalan-persoalan undang-undang yang dibangkitkan di dalam Bahagian A gagal memenuhi syarat puncak s. 96(a) AMK.

(5) Perenggan 3 Fasal 4 Perlembagaan memperuntukkan bahawa kesahan sesuatu undang-undang yang dibuat oleh Parlimen atau mana-mana Badan Perundangan Negeri tidak boleh dipersoalkan atas alasan bahawa ianya membuat peruntukan berkenaan apa-apa perkara yang mana ia tidak mempunyai kuasa untuk membuat undang-undang mengenainya, kecuali dalam tiga jenis prosiding, di mana salah satu darinya ialah "prosiding untuk deklarasi bahawa undang-undang adalah tak sah atas alasan tersebut", dalam keadaan mana Persekutuan

A ataupun Negeri yang berkenaan berhak untuk menjadi pihak kepada prosiding. Perenggan 4 Fasal 4 pula sebaliknya menyatakan bahawa prosiding sedemikian tidak boleh dimulai oleh seseorang individu tanpa kebenaran seorang hakim Mahkamah Persekutuan. Oleh yang demikian, pihak yang ingin
B mencabar keperlembagaan peruntukan yang dicabar di sini hendaklah secara spesifik memohon untuk deklarasi bahawa undang-undang adalah tak sah, dan prosiding sedemikian hanya boleh dimulakan dengan kebenaran seorang hakim Mahkamah Persekutuan. Begitu juga, Negeri yang berkenaan
C hendaklah dijadikan pihak demi untuk memberikannya peluang untuk mempertahankan kesahan atau keperlembagaan peruntukan yang dicabar.

(6) Kesan perenggan-perenggan 3 dan 4 Fasal 4 Perlembagaan,
D seperti yang dijelas di dalam *Abdul Karim bin Abdul Ghani v. The Legislative Assembly of the State of Sabah*, adalah bahawa kesahan atau keperlembagaan undang-undang tidak boleh dipersoalkan melalui serangan secara sampingan sepertimana yang dibuat dalam kes semasa. Ianya dengan itu mengikut
E bahawa Hakim Mahkamah Tinggi, atas alasan ketidakpatuhan prosedur dan ketiadaan bidangkuasa, sepatutnya tidak melayani cabaran yang dibuat terhadap kesahan atau ketidakperlembagaan peruntukan yang dicabar. Ia seterusnya mengikut bahawa, dapatan-dapatan Mahkamah Tinggi bahawa peruntukan yang
F dicabar adalah arbitrari dan tidak berperlembagaan, telah dengan betulnya diketepikan oleh Mahkamah Rayuan.

(7) Persoalan-persoalan perlembagaan sepertimana yang dikemukakan dalam Bahagian B, yang membabitkan penggunaan kalimah
G "Allah" dalam the Herald, adalah berkait dengan hak-hak yang dijamin oleh fasal 3, 8, 10, 11 dan 12 Perlembagaan. Persoalan-persoalan ini tidak boleh dipertimbang secara bersendirian tanpa mengambilkira peruntukan yang dicabar. Bagaimanapun, oleh kerana mahkamah ini telah pun mendapati
H bahawa cabaran terhadap kesahan dan ketidakperlembagaan peruntukan yang dicabar tidak boleh dibuat atas sebab-sebab yang dijelaskan, maka adalah kini tidak terbuka untuk mahkamah ini mempertimbang persoalan-persoalan yang dikemukakan tersebut.

I

(8) Persoalan-persoalan dalam Bahagian C adalah berkait dengan isu-isu keagamaan yang berbangkit secara langsung dari penghakiman-penghakiman yang arif Hakim-hakim Mahkamah Rayuan. Berdasarkan fakta, jelas bahawa keputusan Menteri tidak pernah diasaskan kepada pertimbangan keagamaan. Ianya dengan itu mengikut bahawa pandangan-pandangan seperti yang dinyatakan oleh Hakim-hakim Mahkamah Rayuan berhubung isu-isu tersebut hanyalah *obiter*. Ianya mengikut seterusnya bahawa persoalan-persoalan dalam Bahagian C gagal melepasi syarat puncak s. 96(a) AMK.

Oleh Richard Malanjum KH (Sabah & Sarawak) (menentang):

(1) Pemohon telah melepasi syarat-syarat s. 96(a) dan (b) AMK. Oleh yang demikian, kebenaran harus diberi bagi semua persoalan yang dicadangkan dalam Bahagian A, B dan C sepertimana yang dipohon dalam lampiran 2(a).

(2) Terdapat merit pada hujah pemohon mengenai sumber kuasa Menteri dalam mengenakan syarat-syarat. Ia adalah satu perkara penting yang perlu ditimbang oleh mahkamah ini demi untuk menjelaskan keraguan, memandangkan hakim-hakim Mahkamah Rayuan juga turut berbelah bagi mengenainya. Oleh itu, kebenaran harus diberi untuk perkara ini seperti yang dikemukakan persoalan cadangan 5 Bahagian A.

(3) Terdapat juga pendapat yang berbeza-beza dalam keputusan Mahkamah Rayuan mengenai skop dan sifat kuasa Menteri di bawah Akta (lihat *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* and *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors*). Perbezaan pendapat sedemikian menuntut mahkamah ini untuk memperjelaskan kekeliruan yang berbangkit mengenai ujian betul yang terpakai apabila Menteri melaksanakan budibicaranya di bawah Akta, iaitu sama ada ianya ujian subjektif atau objektif ataupun campuran keduanya. Lebih-lebih lagi bilamana dalam kes semasa, ungkapan "subjectively objective" turut digunakan dalam menimbang keputusan yang dicabar. Oleh itu, kebenaran harus diberi untuk persoalan cadangan 1, 2, 3, 5, 9 dan 10 Bahagian A.

(4) Mengambilkira fakta tak dipertikai bahawa the Herald telah pun diedarkan untuk tempoh 14 tahun sebelum pengenaan keputusan yang cabar dan bahawa penggunaan kalimah "Allah" tidak dilarang dalam lain-lain penerbitan seperti Al-Kitab dan Kitab Suci Sikh, maka wujud isu serius dalam pelaksanaan budibicara oleh Menteri. Persoalan cadangan 6, 7, 8 Bahagian A meliputi isu ini dan kebenaran harus juga diberi untuknya.

(5) Ketenteraman awam dan keselamatan awam bukan dua perkataan yang sama maksudnya, namun Mahkamah Rayuan nampaknya telah menggunakan ungkapan-ungkapan tersebut secara bertukar ganti. Oleh itu terdapat keperluan untuk mahkamah ini menentukan sama ada untuk membezakan ungkapan-ungkapan tersebut atau menyatukannya. Selain itu, berhubung terma-terma ini, oleh kerana pemohon dan responden-responden bertikai mengenai pendekatan yang harus digunapakai, sama ada ianya ujian subjektif atau objektif, satu peluang telah berbangkit untuk mahkamah ini menghuraikan secara muktamad arah tuju undang-undang mengenai kuasa budibicara badan Eksekutif. Kebenaran dengan itu harus diberi untuk persoalan 2, 3, 4 dan 5 Bahagian A yang merangkumi perkara ini.

(6) Terdapat merit pada hujah pemohon bahawa keputusan Menteri seperti yang disahkan oleh Mahkamah Rayuan melanggar fasal 11(1) dan (3) Perlembagaan dan menjejaskan hak penganut-penganut Kristian berbahasa Melayu di Sabah dan Sarawak, atau bahawa interpretasi yang dibuat oleh Mahkamah Rayuan terhadap beberapa fasal penting Perlembagaan akan menyebabkan fasal 3(1) mengatasi fasal-fasal lain serta merendahkan fasal-fasal 3(4), 11(10 dan 11(4) Perlembagaan, serta bertentangan dengan keterangan dokumentari berhubung penubuhan Persekutuan sebagai sebuah negara sekular. Selain itu, berkaitan ujian "essential and integral part of religion" seperti yang diterimapakai oleh Mahkamah Rayuan, tiada sebab mengapa hak-hak di bawah fasal 11 Perlembagaan harus dibataskan kepada bahagian-bahagian penting dan dalaman ataupun teras agama sahaja. Kecuali diputuskan selanjutnya oleh mahkamah ini, interpretasi-interpretasi terhadap fasal Perlembagaan oleh Mahkamah Rayuan ini akan diterima sebagai betul, sebagai undang-undang dan sebagai mengikat mahkamah-mahkamah di bawah serta

rakyat Persekutuan seluruhnya. Oleh itu, adalah amat sesuai bahawa kebenaran diberikan kepada persoalan cadangan di bahagian B kerana ia memenuhi kehendak s. 96(b) AMK. A

(7) Terdapat merit pada hujah pemohon bahawa persoalan cadangan dalam Bahagian C – mengenai boleh atau tidak yang arif Hakim-hakim Mahkamah Rayuan menjalankan penyelidikan mereka sendiri melalui internet dan bergantung kepadanya bagi menyokong penghakiman mereka – adalah terangkum di bawah ruanglitup s. 96(a) AMK. Ini adalah persoalan baru dan hujah-hujah lanjutan mengenainya adalah penting dan bermanfaat untuk orang awam. Oleh itu, kebenaran harus diberi untuk persoalan cadangan di Bahagian C. B C

Oleh Zainun Ali HMP (menentang):

(1) Isu sumber kuasa nampaknya diliputi oleh ketidaktentuan. Menteri sendiri bertegas mengenai sumber kuasanya sementara Mahkamah Rayuan pula berbelah bagi. Mengambilkira ketidaktentuan ini, adalah penting bahawa sumber kuasa diperjelaskan dan diselesaikan mengikut termanya oleh mahkamah ini. D E

(2) Dalam kes-kes semakan kehakiman, mahkamah-mahkamah di Malaysia telah lama berubah dari hanya membenarkan semakan terhadap proses kepada semakan terhadap kedua-dua proses dan intipati (substance) dalam menentukan kemunasabahan sesuatu keputusan yang dibuat oleh sesuatu pihak berkuasa awam. Pendekatan berbeza-beza yang dibuat oleh Mahkamah Rayuan atas isu ini harus ditangani oleh mahkamah ini. Kebenaran harus juga diberi disebabkan keputusan Mahkamah Rayuan di bawah adalah tidak selari dengan keputusan terdahulu Mahkamah Rayuan di dalam *Dato' Seri Syed Hamid Syed Jaafar Albar v. Sisters in Islam* apabila mengupas peruntukan Akta yang sama. (yang satu menggunapakai ujian "subjectively objective" sementara yang satu lagi ujian objektif). F G

(3) Meneliti penghakiman utama Mahkamah Rayuan menunjukkan bahawa Mahkamah Rayuan secara pentingnya telah menggunakan ujian subjektif. Yang arif hakim telah bersetuju dengan keputusan di dalam *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors*, yang, walaupun menggunapakai ujian subjektif menganjurkan penggunaan ujian campuran dalam H I

pendekatannya. Yang arif hakim bagaimanapun meneruskan dengan berkata bahawa penilaian fakta-fakta adalah dibuat secara "subjectively objective" dan bahawa itu adalah bersesuaian dengan rasional dalam *Darma Suria v. Menteri Dalam Negeri*. Tetapi, *Arumugam* dengan jelas menggunakan ujian subjektif/objektif sedangkan *Darma Suria* menggunapakai ujian objektif sepenuhnya. Terma "subjectively objective" juga adalah satu paradox, kerana merupakan dua konsep yang saling menolak satu sama lain. Jika sekalipun dikatakan bahawa Mahkamah Rayuan telah sebenarnya menggunapakai ujian objektif walaupun ia menggunakan label "subjective objective" bagi mentakrifkannya, itu hanya akan mendorong kepada lebih banyak kekeliruan. Kekeliruan-kekeliruan ini hanya boleh dirungkai jika pihak-pihak diberikan peluang untuk berhujah apabila kebenaran diberi.

(4) Walaupun kes-kes yang melibatkan keselamatan awam dan ketenteraman awam adalah di bawah bidangkuasa Menteri, pelaksanaan kuasa oleh Menteri tidak terkeluar dari kekompetenan mahkamah. Adalah wajib bagi Menteri memberikan sebab-sebab atau mengemukakan keterangan bahawa pelaksanaan kuasanya adalah sah dan munasabah. Dalam kes ini, alasan-alasan pemohon bercakap mengenai pelanggaran hak-haknya di sisi undang-undang dan Perlembagaan. Oleh itu, persoalan berbangkit sama ada Menteri telah melaksanakan keadilan prosedur dan substantif dan bertindak secara yang bersepadanan serta melaksanakan budibicaranya selaras dengan tujuan statutori Akta. Maka itu juga wujud keperluan bagi mahkamah ini mendengar hujah-hujah atas merit dan memperjelaskan kedudukan halperkara dalam satu forum yang sesuai.

(5) Isu-isu yang dikemukakan untuk pertimbangan adalah berkepentingan awam dalam maksud s. 96(a) AMK. Satu keputusan terhadap isu-isu di mana mahkamah ini menyemak kembali penghakiman Mahkamah Rayuan bagi menentukan kebetulannya dari segala aspek tentunya amat penting dan amat bermanfaat kepada awam.

(6) Saya tidak akan menjawab persoalan-persoalan yang dibangkitkan dalam Bahagian B memandangkan persoalan-persoalan dalam Bahagian A sudah memberikan justifikasi yang mencukupi untuk kebenaran diberi di bawah s. 96(a) AMK.

(7) Berhubung persoalan-persoalan dalam Bahagian C, yang arif hakim-hakim di mahkamah di bawah sepatutnya membataskan diri mereka semata-mata kepada isu undang-undang yang dibangkitkan, kerana persoalan benar atau tidaknya rukun-rukun dan kepercayaan agama, benar atau tidaknya amalan-amalan keagamaan dll adalah di luar kekompetenan kita sebagai pengadil-pengadil fakta dan undang-undang. Persoalan-persoalan tersebut jelasnya adalah 'non-justiciable'. Begitu juga, fakta-fakta sejarah serta fakta-fakta lain yang diambil dari keterangan afidavit dan internet adalah tidak disahkan atau disokong dan dengan itu adalah tidak boleh diterimamasuk. Oleh itu, kebenaran di bawah s. 96(a) harus diberi untuk persoalan-persoalan dalam Bahagian C, kerana adalah untuk manfaat awam bahawa isu-isu ini ditangani dan halperkara diletakkan dalam perspektifnya yang betul sebagai panduan untuk masa hadapan.

Oleh Jeffrey Tan HMP (menentang):

(1) Berhubung permohonan semasa untuk mendapatkan kebenaran merayu, tugas mahkamah ini hanyalah untuk menentukan sama ada kehendak-kehendak perenggan kecil (a) atau (b) s. 96 AMK telah dipenuhi. Tanggungjawab mahkamah ini tidak lebih dari setakat itu sahaja. Maka, tidak harus ada gesaan untuk mengadili isu-isu berdasarkan merit, yang mana, dalam kes ini, masih belum dibangkit atau dihujahkan.

(2) Adalah jelas bahawa di setiap peringkat di mana syarat (i) (keputusan Menteri) telah dipertimbang dan kemudiannya disemak, oleh Menteri yang mengenakan syarat tersebut, oleh Mahkamah Tinggi yang mengenepikannya, dan oleh Mahkamah Rayuan yang mengesahkan syarat (i), wujud isu-isu mengenai keperlembagaan syarat (i). Adalah juga jelas bahawa isu-isu/persoalan-persoalan keperlembagaan sedemikian telah sama ada dipertahan atau dijustifikasikan oleh Menteri dan dijawab oleh mahkamah berdasarkan peruntukan-peruntukan Perlembagaan dan kesan-kesannya. Mahkamah Tinggi dan Mahkamah Rayuan mungkin telah mencapai keputusan yang berbeza. Namun, hakikinya masih lagi bahawa ini adalah keputusan-keputusan mahkamah di bawah mengenai kesan-kesan peruntukan Perlembagaan. Seksyen 96(b) AMK mempunyai hanya satu syarat, iaitu "dari apa-apa keputusan mengenai kesan mana-

A mana peruntukan Perlembagaan termasuk kesahan mana-mana undang-undang bertulis yang berkait dengan peruntukan tersebut". Adalah jelas bahawa satu-satunya syarat s. 96(b) telah dipenuhi.

B **(3)** Persoalan-persoalan perlembagaan harus dijawab oleh Mahkamah Persekutuan. Persoalan-persoalan ini terlalu penting untuk dijawab oleh selain darinya. Kebenaran harus diberi supaya keperlembagaan syarat (i) boleh dibangkitkan dalam satu rayuan ke Mahkamah Persekutuan.

C **Case(s) referred to:**

A (FC) & Others v. Secretary of State for the Home Department [2004] UKHL 56 ***(refd)***

Abdul Karim Abdul Ghani v. The Legislative Assembly of the State of Sabah [1988] 1 CLJ 460; [1988] 1 CLJ (Rep) 1 SC ***(refd)***

D *Ah Thian v. Government of Malaysia [1976] 1 LNS 3* ***(refd)***

Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147 ***(refd)***

Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors [2013] 1 LNS 296 CA ***(refd)***

Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

E *Athappen Arumugam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1983] 1 LNS 182* ***(refd)***

Buckle v. Holmes [1926] 2 KB 125 ***(refd)***

Chandrasekaran & Ors v. PP [1970] 1 LNS 11 HC ***(refd)***

Che Omar Che Soh v. PP [1988] 2 MLJ 55 ***(refd)***

F *Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141* ***(refd)***

Chng Suan Tze v. The Minister of Home Affairs & Ors and Other Appeals [1988] 1 LNS 162 CA; [1998] SLR 525 ***(refd)***

Council of Civil Service Unions & Ors v. Minister of Civil Service [1985] 1 AC 374 ***(refd)***

G *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300 FC* ***(refd)***

Dato' Ambiga Sreenevasan & Ors v. Menteri Dalam Negeri & Ors [2012] 7 CLJ 43 HC ***(refd)***

Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS
H *Forum (Malaysia) [2012] 9 CLJ 297 CA* ***(refd)***

Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato Ting Check Sii [2009] 4 CLJ 449 FC ***(refd)***

Datuk Justine Jinggut v. Pendaftar Pertubuhan [2012] 1 CLJ 825 CA ***(refd)***

Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors [1999] 1 CLJ 325 FC ***(refd)***

I

Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 CA ***(refd)***

East Union (Malaya) Sdn Bhd v. Government of State of Johore & Government of Malaysia [1980] 1 LNS 18 FC ***(refd)***

Ex Parte Gilchrist, In Re Armstrong (1886) 17 QBD 521 ***(refd)***

Ex Parte Sim Soo Koon [1915] SSLR 57 ***(refd)***

Fathul Bari Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors [2012] 4 CLJ 717; [2012] 1 CLJ (Sya) 233 FC ***(refd)***

Greene v. Secretary of State for Home Affairs [1942] AC 284 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Hough v. Windus [1883-1884] 12 QBD 224 ***(refd)***

Jessie Tan Gek Neo v. The Minister for Finance & Anor [1991] 1 CLJ 622; [1991] 4 CLJ (Rep) 877; [1991] SLR 325 ***(refd)***

Joceline Tan Poh Choo & Ors v. V Muthusamy [2009] 1 CLJ 650 FC ***(refd)***

John Peter Berthelsen v. Director-General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(refd)***

Kamal Jit Singh v. Minister for Home Affairs [1992] 3 SLR (R) 352 ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia [1969] 1 LNS 65 FC ***(refd)***

Kerajaan Malaysia & Ors v. Nasharuddin Nasir [2004] 1 CLJ 81 FC ***(refd)***

Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v. Kumar Gurusamy [2011] 3 CLJ 241 FC ***(refd)***

Kredin Sdn Bhd v. OCBC Bank (Malaysia) Bhd [1998] 2 CLJ 797 FC ***(refd)***

Lee Mau Seng v. Minister for Home Affairs, Singapore & Anor [1971] 1 LNS 58; [1971-1973] SLR 135 HC ***(refd)***

Liverpool v. Secretary of State for the Home Department [2008] EWCA Civ 443 ***(refd)***

Liversidge v. Anderson [1942] AC 206 ***(refd)***

London and North Eastern Railway Company v. Berriman (1946) 1 AC 278 ***(refd)***

Mamat Daud & Ors v. The Government of Malaysia [1986] 2 CLJ 118; [1986] CLJ Rep 190 SC ***(refd)***

Meor Atiqulrahman Ishak & Ors v. Fatimah Sihi & Ors [2006] 4 CLJ 1 FC ***(refd)***

Merdeka University Berhad v. Government of Malaysia [1982] 1 LNS 1 FC ***(refd)***

Minister for Home Affairs, Malaysia & Anor v. Jamaluddin Othman [1989] 1 CLJ 1044 SC ***(refd)***

Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186 SC ***(refd)***

Mkini Dotcom Sdn Bhd v. Ketua Setiausaha Dalam Negeri & Ors [2013] 6 AMR 668 ***(refd)***

Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC ***(refd)***

Mohinder Singh Khaira & Ors v. Daljit Singh Shergill & Ors [2012] EWCA Civ 983 ***(refd)***

Muhammad Hilman Idham v. Kerajaan Malaysia & Ors [2011] 9 CLJ 50 CA ***(refd)***

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***

Padfield v. Minister of Agriculture, Fisheries and Food [1968] AC 997 ***(refd)***

Pearlman v. Keepers and Governors of Harrow School [1979] QB 56 ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Q & Ors, R (On the Application of) v. Secretary of State for the Home Department [2003] EWCA Civ 364 ***(refd)***

R v. Secretary of State for the Home Department, Ex Parte Peirson [1998] AC 539 ***(refd)***

R v. Secretary of State for the Home Department Ex Parte Daly [2001] UKHL 26 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ramsay v. Accident Compensation Corporation [2004] NZAR 1 ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Re Wong Sin Yee [2007] 4 SLR (R) 676 ***(refd)***

Rethana M Rajasigamoney v. The Government of Malaysia [1984] 1 CLJ 352; [1984] 1 CLJ (Rep) 323 FC ***(refd)***

Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia & Anor [2013] 2 CLJ 137 CA ***(refd)***

Schenck v. United States [1919] 249 US 47 ***(refd)***

Sharp v. Wakefield [1891] AC 173 ***(refd)***

Sisters in Islam v. Syed Hamid Albar [2010] 2 MLJ 377 ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(refd)***

Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases [2009] 2 CLJ 54 FC ***(refd)***

Syarikat Banita Sdn Bhd v. Government of State of Sabah [1977] 1 LNS 125 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications [2011] 1 CLJ 51 FC ***(refd)***

Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 LNS 132 SC ***(refd)***

Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Liau Nyun Fui [1991] 1 CLJ 458; [1991] 1 CLJ (Rep) 458 SC ***(refd)***

Walsh v. Secretary of State for India [1863] 11 ER 1068 ***(refd)***
Webb v. United Kingdom [1997] 24 EHRR CD 73 ***(refd)***
Whitney v. California [1927] 274 US 357 ***(refd)***
YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***
Yeap Hock Seng v. Minister for Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 ***(refd)***
Yeoh Tat Thong v. Government of Malaysia & Anor [1973] 1 LNS 180 FC ***(refd)***
Yong Vui Kong v. Attorney-General [2011] SGCA 9 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 96(a), (b)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)
Federal Constitution, arts. 3(1), (4), (5), 4, 8(1), 10(1)(c), 11(1), (3), (4), (5), 12, 128
Interpretation Acts 1948 and 1967, s. 40
Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988, s. 9
Printing Presses and Publications Act 1984, ss. 6, 7(1), 12, 13A, 26
Rules of the High Court 1980, O. 53 rr. 3(1), 8
Universities and University Colleges Act 1971, s. 6(1)

Defence (General) Regulations 1939 [UK], reg. 18B
Internal Security Act [Sing], s. 8

For the applicant
Cyrus V Das (Porres Royan, Gurubachan Singh Johal, Philip Koh Tong Ngee, S Selvarajah & Benjamin Dawson with him); M/s Fernandez & Selvarajah

For the 1st respondent (Menteri Dalam Negeri)
Suzana Atan (Arik Sanusi Yeop Johari, Munahyza Mustafa, Shamsul Bolhassan & Andi Razalijaya A Dadi with her); SFC

For the 2nd respondent (Kerajaan Malaysia)
Suzana Atan (Arik Sanusi Yeop Johari, Munahyza Mustafa, Shamsul Bolhassan & Andi Razalijaya A Dadi with her); SFC

For the 3rd respondent (Majlis Agama Islam & Adat Melayu Terengganu)
Sulaiman Abdullah (Zainul Rijal Abu Bakar, Wan Mohd Haidi Wan Jusoh & Mubashir Mansor with him); M/s Zainul Rijal Talha & Amir

For the 4th respondent (Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur)
Abdul Rahim Sinwan (Abdul Halim Bahari with him); M/s Azra & Assocs

For the 5th respondent (Majlis Agama Islam Negeri Melaka)
Mohd Adli Ithnin (Nur Syazwani Rosli with him); M/s Adli & Co

For the 6th respondent (Majlis Agama Islam Negeri Johor)
Ikbal Salam (Azril Mohd Amin with him); M/s Ikbal Salam & Assocs

For the 7th respondent (Majlis Agama Islam Negeri Kedah)
Nawan Harun @ Abdul Rahman (Siti Razasah Abd Razak with him); M/s Omayah, Nawal & Partners

For the 8th respondent (Malaysian Chinese Muslim Association)
Mohamed Haniff Khatri Abdulla (Mohd Tajuddin Abd Razak & Ridha Abdah Subri with him); M/s Tajuddin Razak

For the 9th respondent (Majlis Agama Islam Negeri Selangor)
Abdul Aziz Abdul Rahman (Mohd Fasha Musthafa with him); M/s Azra & Assocs

Counsel holding watching brief
Bar Council - Syahredzan Johan; M/s Ramrais & Partners
Commonwealth Law Association - David Dinesh Mathew; M/s Shook Lin & Bok
Malaysian Consultative Council of Christianity, Buddhism, Hinduism and Taoism - Manjeet Singh Dhillon (Jagjit Singh & A Kanesalingam with him); M/s Manjeet Singh Dhillon
Christian Federation of Malaysia - Wong Chong Wah; M/s Wong and Wong
World Council of Churches - Francis Pereira; M/s Francis Pereira & Shan
The Council of Churches of Malaysia - Joseph Lourdesamy; M/s Joseph & Co
Sidang Injil Borneo Semenanjung - Annou Xavier; M/s Azri, Lee Swee Seng & Co
Sidang Injil Borneo Sabah - Bobby Chew Ching Guan; M/s Chris Koh & Chew
Sidang Injil Borneo Sarawak - Kenny Ng Bee Ken; M/s Azri, Lee Swee Seng & Co
Association of Churches in Sarawak - Rodney NT Koh; M/s Koh & CH Tay
Sabah Council of Churches - Lim Heng Seng; M/s Lee Hishamuddin Allen & Gledhill
Sabah Council of Churches - Irwin Lo Chi Vui; M/s Lo Chambers
Malaysian Chinese Association - Gan Ping Sieu; M/s Gan & Zul

Amicus Curiae
Advocates Association of Sarawak - Leonard Shim; M/s Reddi & Co, Advocs
- Musa Dinggat; M/s Musa Dinggat, Advocs

[Appeal from Court of Appeal; Civil Appeal No: W-01-1-2010]

Reported by Wan Sharif Ahmad

JUDGMENT

Arifin Zakaria (CJ) (majority):

Introduction

[1] This is an application for leave to appeal against the decision of the Court of Appeal dated 14 October 2013 in allowing the respondents' appeal against the decision of the High Court. A number of questions of law were posed by the applicant and are divided into three parts. (see appendix)

Facts

[2] The applicant is the publisher of "Herald - the Catholic Weekly" ('the Herald'). The Herald is published on behalf of the Bishops of Peninsular Malaysia pursuant to a publication permit ('the permit') issued by the first respondent under the Printing Presses and Publications Act 1984 ('the Act').

[3] The first respondent is the Minister charged with the responsibility of regulating the publishing and distribution of publications under the Act ('the Minister').

[4] The second respondent is the Government of Malaysia.

[5] The third to seventh and the ninth respondents are the Islamic Councils of the States of Terengganu, Wilayah Persekutuan, Melaka, Johor, Kedah and Selangor. The eighth respondent is the Malaysian Chinese Muslim Association.

[6] The applicant was granted a publication permit by the Minister *vide* letter dated 30 December 2008 to publish the Herald in four languages, namely Bahasa Melayu, English, Tamil and Chinese. The relevant part of the permit reads:

> KELULUSAN PERMOHONAN PERMIT PENERBITAN
>
> ...
>
> 2. Sukacita dimaklumkan permohonan tuan telah diluluskan dengan bersyarat seperti butiran di bawah:
>
> (i) Penerbitan dalam Bahasa Melayu tidak dibenarkan sehingga keputusan mahkamah berkaitan kes penggunaan kalimah "ALLAH" diputuskan.

A (ii) Penerbitan ini hendaklah dijual di gereja sahaja.

(iii) Di muka surat depan majalah mestilah memaparkan "Bacaan ini hanya untuk penganut agama Kristian sahaja".

B **[7]** Aggrieved with the conditions imposed by the Minister, the applicant then wrote to the Minister *vide* letter dated 2 January 2009 requesting the Minister to reconsider the decision and revoke the aforesaid conditions. The relevant part of the letter reads:

C

> We are therefore advised and verily believe that this condition constitutes a serious violation of our constitutional freedom of expression and speech. It also prohibits and/or diminishes the rights of the citizens of this country to express themselves and communicate in the national language in clear contravention of the
> D spirit and intent of the National Language Act 1967. Further connecting the matter of the publication in Bahasa Malaysia with the determination of the pending judicial review proceedings is not only grossly unreasonable, irrational and illegal but also reeks of ill-will and bad faith in that this condition serves as a form of
> E retribution or punishment on account of our filing of the pending judicial review proceedings in the High Court.
>
> …
>
> We therefore seek that you reconsider your decision and revoke
> F the conditions cited in your letter under reference.

[8] In reply, the Minister *vide* letter dated 7 January 2009 to the applicant, after reconsidering his decision, approved the permit for publication subject to the condition that the applicant be prohibited from using the word "Allah". The letter reads:

G

> KELULUSAN PERMOHONAN PERMIT PENERBITAN
>
> "HERALD – THE CATHOLIC WEEKLY"
>
> …
>
> H
> 2. Untuk makluman pihak tuan, Bahagian ini telah membuat pertimbangan semula ke atas kelulusan permohonan permit penerbitan bagi penerbitan dengan tajuk di atas dan keputusannya adalah seperti berikut:

I

(i) Permohonan penerbitan dalam Bahasa Melayu adalah dibenarkan, namun demikian, penggunaan kalimah "ALLAH" adalah dilarang sehingga mahkamah membuat keputusan mengenai perkara tersebut.

(ii) Di halaman hadapan penerbitan ini, tertera perkataan "TERHAD" yang membawa maksud penerbitan ini adalah terhad untuk edaran di gereja dan kepada penganut Kristian sahaja.

3. Sehubungan ini, kelulusan dengan bersyarat yang telah dikenakan ke atas penerbitan ini pada 30 Disember 2008 (Ruj Kami: KDN: PQ/PP 1505(8480) (101) adalah dengan sendirinya terbatal.

High Court

[9] Dissatisfied with the decision of the Minister, the applicant then filed an application for judicial review under O. 53 r. 3(1) of the Rules of the High Court 1980 (the RHC), challenging the decision of the Minister in which the following reliefs were sought:

(a) the Applicant be granted leave pursuant to Order 53 Rule 3(1) of the Rules of the High Court 1980 to apply for an Order of *Certiorari* to quash the decision of the Respondents dated 7.1.2009 that the Applicant's Publication Permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the Applicant is prohibited from using the word "Allah" in "Herald – The Catholic Weekly" pending the Court's determination of the matter;

(b) Jointly or in the alternative, that the applicant be granted leave pursuant to Order 53 Rule 3(1) of the Rules of the High Court 1980 to apply for the following Declarations:

(i) that the decision of the Respondents dated 7.1.2009 that the Applicant's Publication Permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the Applicant is prohibited from using the word "Allah" in "Herald – The Catholic Weekly" pending the Courts determination of the matter is illegal and null and void;

(ii) that pursuant to Article 3(1) of the Federal Constitution the Applicant has the constitutional right to use the word "Allah" in "Herald – The Catholic Weekly" in the exercise of the Applicant's right that religion other than Islam may be practised in peace and harmony in any part of the Federation;

(iii) that Article 3(1) of the Federal Constitution which states that Islam is the religion of the Federation does not empower and/or authorise the Respondents to prohibit the Applicant from using the word "Allah" in "Herald – The Catholic Weekly";

(iv) that pursuant to Article 10 of the Federal Constitution the Applicant has the constitutional rights to use the word "Allah" in "Herald – The Catholic Weekly" in the exercise of the Applicant's right to freedom of speech and expression;

(v) that pursuant to Article 11 of the Federal Constitution the Applicant has the constitutional right to use the word "Allah" in "Herald – The Catholic Weekly" in the exercise of the Applicant's freedom of religion which includes the right to manage its own religious affairs;

(vi) that pursuant to Article 11 and Article 12 of the Federal Constitution the Applicant has the constitutional right to use the word "Allah": in 'Herald – The Catholic Weekly" in the exercise of the Applicant's right in respect of instruction and education of the Catholic congregation in the Christian religion;

(vii) that the Printing Presses and Publications Act 1984 does not empower and/or authorise the Respondents to prohibit the Applicant from using the word "Allah" in "Herald – The Catholic Weekly";

(viii) that the decision of the Respondents dated 7.1.2009 that the Applicant's Publication Permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the Applicant is prohibited from using the word "Allah" in "Herald – The Catholic Weekly" pending the Court's determination of the matter is *ultra vires* the Printing Presses and Publication Act 1984; and

(ix) that the word "Allah" is not exclusive to the religion of Islam.

(c) An order for stay of the decision of the Respondents dated 7.1.2009 that the Applicant's Publication Permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the Applicant is prohibited from using the word "Allah" in "Herald – The Catholic Weekly" pending the Court's determination of the matter and/or any or all actions or proceedings arising from the said decision pending determination of this Application or further order;

(d) Costs in the cause; and

(e) Any further and/or other relief that this Honourable Court may deem fit to grant.

[10] The grounds in support of the application are as follows:

... The Respondents in making the decision dated 7.1.2009:

(i) acted in breach of the rules of natural justice, procedural and substantive fairness and the duty to act fairly;

(ii) asked the wrong questions in the decision making process;

(iii) took into account irrelevant considerations;

(iv) omitted to take into account relevant considerations;

(v) acted in violation of the Applicant's legal rights in line with the spirit, letter and intent of Articles 3, 10, 11 and 12 of the Federal Constitution;

(vi) were irrational and unreasonable within the ambit of the principles laid down in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* (1948) 1 KB 223;

(vii) acted irrationally and unreasonably by prohibiting the Applicant from using the word "Allah" or directly quoting the word "Allah" from the Al-Kitab;

(viii) acted illegally, misconstrued and misapplied the relevant provisions of the Printing Presses and Publications Act 1984;

(ix) acted *ultra vires* the printing Presses and Publications Act 1984;

(x) imposed conditions on the applicant which are oppressive and onerous; and

(xi) acted *mala fide*.

[11] In the meantime the third to the ninth respondents filed applications under O. 53 r. 8 of the RHC to be heard in opposition.

Decision Of The High Court

[12] On 31 December 2009, the High Court allowed the applicant's application for judicial review and made, *inter alia*, the following orders:

(i) An order of *certiorari* quashing the decision of the Minister dated 7 January 2009 that the applicant's publication permit for the period 1 January 2009 until 31 December 2009 is subject to the condition that the applicant is prohibited from using the word "Allah" in the Herald, pending the court's determination of the matter.

(ii) Jointly, the High Court granted the following declarations:

(a) that the decision of the Minister dated 7 January 2009 that the applicant's publication permit for the period 1 January 2009 until 31 December 2009 is subject to the condition that the applicant is prohibited from using the word "Allah" in the Herald pending the court's determination of the matter is illegal, null and void;

(b) that pursuant to art. 3(1) of the Federal Constitution, the applicant has the constitutional right to use the word "Allah" in the Herald in the exercise of the applicant's right that religions other than Islam may be practised in peace and harmony in any part of the Federation;

(c) that art. 3(1) of the Federal Constitution which states that Islam is the religion of the Federation does not empower and/or authorise the Minister to prohibit the applicant from using the word "Allah" in the Herald;

(d) that pursuant to art. 10 of the Federal Constitution, the applicant has the constitutional right to use the word "Allah" in the Herald in the exercise of the applicant's right to freedom of speech and expression;

(e) that pursuant to art. 11 of the Federal Constitution, the applicant has the constitutional right to use the word "Allah" in the Herald in the exercise of the applicant's freedom of religion which includes the right to manage its own religious affairs; and

(f) that pursuant to art. 11 and art. 12 of the Federal Constitution, the applicant has the constitutional right to use the word "Allah" in the Herald in the exercise of the applicant's right in respect of instruction and education of the Catholic congregation in the Christian religion.

[13] The High Court also dismissed the third to the ninth respondents' application to be heard in opposition.

Court Of Appeal

[14] Aggrieved, the first and the second respondents appealed to the Court of Appeal against the decision of the High Court dated 31 December 2009.

[15] The third to the ninth respondents also appealed to the Court of Appeal against the decision of the High Court which dismissed their applications to be heard in opposition.

[16] On 23 May 2013, the Court of Appeal, by consent of parties, allowed the third to the ninth respondents' appeal against the decision of the High Court dismissing their applications to be heard in opposition. They were accordingly joined as parties to the appeal.

[17] On 8 July 2013, the applicant filed an application to strike out the respondents' appeal on the grounds that the appeals had been rendered academic by reason of the "ten-point solutions" contained in the Rt Hon Prime Minister of Malaysia's letter dated 11 April 2011. The Court of Appeal on 22 August 2013, dismissed the applicant's striking out application.

[18] On 14 October 2013, the Court of Appeal allowed the respondents' appeal and the orders of the High Court were accordingly set aside.

Findings Of This Court

The Leave Application

[19] A total of 28 leave questions were posed by the applicant which were divided into three parts under the headings of administrative law questions, constitutional law questions and general questions. For leave to be granted, the burden lies on the applicant to satisfy this court that the questions posed pass the threshold set out in s. 96 of the Courts of Judicature Act 1964 (the CJA). For ease of reference, we set out below the relevant part of the said section:

A

> 96. Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
>
> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[20] The leading authority on s. 96(a) of the CJA currently is the case of *Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51. This court in *Terengganu Forest* (*supra*) sought to straighten out the conflicting views in the earlier decisions of this court in *Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors* [1999] 1 CLJ 325 and *Joceline Tan Poh Choo & Ors v. V Muthusamy* [2009] 1 CLJ 650.

[21] In *Terengganu Forest* (*supra*), this court set out the threshold that an applicant needs to satisfy the court before leave could be granted under s. 96(a) of the CJA. The relevant part of the judgment reads:

> [23] It is also clear from the section that the cause or matter must have been decided by the High Court in its original jurisdiction. The legal issue posed to this court may have arisen from the decision of the High Court in the exercise of its original jurisdiction or in the Court of Appeal in the course of its giving its judgment or making its order under the first limb and must be questions of general principles. Under the first limb, that decision by the Court of Appeal must however have raised a question of law which is of general principle not previously decided by this court. If it has been so decided then that decision becomes a binding precedent in which case there is no need for leave to be given on that question. Alternatively the applicant must show that the decision would be to public advantage. In my opinion the fact that it would be of public advantage must necessarily involve further arguments before this court. Also, because it is to be decided by this court the words 'further

> argument and a decision of the Federal Court' used in that subsection are, to me, superfluous. There must necessarily be further arguments and the Federal Court must also make a decision. What is important is that the decision answering the question would be to the public advantage. In England, they use the term 'a point of law of general public importance' (s. 1 of the Administration of Justice Act 1960). What is important to the public must also necessarily be an advantage to be decided by this court.

[22] The criteria under s. 96(a) of the CJA may be summarised as follows:

(a) that the leave to appeal must be against the decision of the Court of Appeal;

(b) that the cause or matter was decided by the High Court in exercising its original jurisdiction; and

(c) the question must be a question of law of general principle not previously decided by the court ie, it must be an issue of law of general principle to be decided for the first time (the first limb of s. 96(a) of the CJA); or

(d) alternatively, it is a question of importance upon which further argument and decision of this court would be to public advantage (this is akin to revisiting the questions of law already decided by this court if it thinks that it is to public advantage to do so – the second limb of s. 96(a)) of the CJA.

Part A: Administrative Law Questions

[23] The questions of law posed in Part A relate to the test in judicial review application: whether it is the objective or the subjective test to be applied. Learned counsel for the applicant contended that the Court of Appeal in the present case appeared to have taken a step backward from the prevailing objective to that of the subjective test as applied in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129 and *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81. He submitted that the current test in judicial review cases is the objective test as propounded in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145. He further submitted that the old approach adopted by the court that judicial review is only

concerned with the decision making process and not with the substance of the decision itself had long been discarded by the court, and should not therefore be followed. He referred us to a plethora of authorities in support of his contention. (See *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300; *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309; [2002] 4 MLJ 449; and the Singapore case *Chng Suan Tze v. The Minister of Home Affairs & Ors and Other Appeals* [1988] 1 LNS 162; [1989] 1 MLJ 69).

[24] Learned counsel for the applicant further contended that in the present case, Apandi Ali JCA (as he then was) in the leading judgment of the Court of Appeal adopted the fusion of the two tests as propounded in *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors* [2013] 1 LNS 296; [2013] 5 MLJ 174, also a decision of the Court of Appeal. Similarly, learned counsel for the applicant contended that Abdul Aziz Rahim JCA, while endorsing *Arumugam Kalimuthu* (*supra*) had applied the subjective test. In the circumstances, he urged this court to grant leave in order to resolve the prevailing confusion. The leave if granted would finally decide whether the test applicable as regards the Minister's discretion under the Act is the objective or the subjective test.

[25] Learned Senior Federal Counsel in reply submitted that in a judicial review involving the Minister's discretion under the Act, the proper test is the subjective test and the court is only concerned with the decision making process rather than with the substance of the decision.

[26] The power of the Minister to grant a permit to print and publish a newspaper in Malaysia is contained in s. 6 of the Act, while s. 12 of the Act gives the Minister the discretion to impose any condition on the permit as he deems fit. In the exercise of the said discretion, the Minister in the present case prohibited the use of the word "Allah" in the Herald. It is not disputed that the nature of the conditions that may be imposed by the Minister falls within his discretion. The issue before us is whether the imposition of such conditions in the exercise of his discretion under the Act is subject to judicial scrutiny or otherwise.

[27] Having considered the issue at hand, I agree with learned counsel for the applicant that the law on judicial review has advanced from the subjective to that of the objective test. Hence, in *Merdeka University Berhad v. Government of Malaysia* [1982] 1 LNS 1; [1982] 2 MLJ 243 (FC), Suffian LP observed:

> It will be noted that section 6 used the formula 'If the Yang di-Pertuan Agong is satisfied etc'. In the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned Judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable - see the cases cited by the learned Judge at page 360.

(See also *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 (FC); *John Peter Berthelsen v. Director General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160; [1987] 1 MLJ 134 (SC); *Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara* [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186; [1990] 1 MLJ 351 (SC); *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261 (CA); *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665 (CA); *R Rama Chandran* (*supra*); *YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471; [1999] 2 MLJ 337 (FC); *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19; [2006] 6 MLJ 213 (CA)).

As laid down by the above authorities it is therefore trite that the test applicable in judicial review is the objective test.

[28] In considering the issue of whether the Court of Appeal had applied the correct test or not, I am of the view that it is pertinent to consider the whole body of the judgments of the learned judges of the Court of Appeal and not just by looking at the terms used in the judgments. After all, it is the substance of the judgments rather than the terms alluded to that should be used as the yardstick. In the present case, even though

Apandi Ali JCA had used the term 'subjectively objective' in his judgment, he however referred to the case of *Darma Suria* (*supra*), which clearly propounded the objective test. He stated:

> [28] On the issue of the exercise of discretion in imposing the condition of prohibiting the usage of the word "Allah" by the respondent in the Malay versions of the Herald, I could not agree more than what was decided by this court in *Arumugam a/l Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors* [2013] 5 MLJ 174; [2013] 4 AMR 289.
>
> [29] That case dealt with issues of irrationality and illegality. It was held in *Arumugam*'s case that the issue of irrationality is intertwined with the discretionary power of the Minister. And it dwelt with the objective balancing of the statutory and constitutional framework and the sensitivities of the community. Without repeating the principles discussed and decided therein, it is pertinent to state the appraisal of the facts by the Minister in the appeal before us has been correctly done, namely by way of it being subjectively objective. This is in line with the rationale in the Federal Court decision in *Darma Suria Risman v. Menteri Dalam Negeri, Malaysia & 3 Ors* [2010] 1 CLJ 300.

In *Darma Suria* (*supra*), this court held that if state action affects fundamental rights, the court will not only look into the procedural fairness but also substantive fairness. There must exist a minimum standard of fairness, both substantive and procedural. (See *R v. Secretary of State for the Home Department, Ex Parte Peirson* [1998] AC 539, 591E).

[29] As a matter of fact, Apandi Ali JCA had also applied the principle of reasonableness as established in the case of *Associated Provincial Picture Houses, Limited v. Wednesbury Corporation* [1948] 1 KB 223 and *Council of Civil Service Unions & Ors v. Minister of Civil Service* [1985] 1 AC 374 in determining the validity of the Minister's decision. This is found in his judgment where he stated:

> [4] ... A judicial review is not to be treated as an appeal. Corollary to that, the court can quash an administrative decision without substituting for its own. In short, the court is not performing an appellate function. On this trite law, it will be suffice to refer to the celebrated case of *Associated Provincial Picture Houses v. Wednesbury Corp* [1948] 1 KB 223, where Lord Greene MR, summed up as follows:
>
> > The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and

> concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.
>
> [5] The above *Wednesbury* case was cited with approval, and followed by our Supreme Court case *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 2 MLJ 9.
>
> ...
>
> [23] Imposition of a condition in a licence or permit is an exercise of the discretion of the Minister. Such discretion must not be unfettered or arbitrary. Such exercise of discretion must be reasonable. What is reasonable depends on the facts and circumstances of the case. What is a justifiable circumstances depends on the necessity of the occasion.

He further stated at para. 47 as follows:

> [47] Applying the law to the facts and circumstances of the case and bearing in mind the principles to be taken in dealing with judicial review as laid down in the often-quoted case of *Council of Civil Service Unions & Ors v. Minister of Civil Service* [1985] 1 AC 374; [1984] 4 All ER 935, it is my considered finding that the Minister has not acted in any manner or way that merit judicial interference on his impugned decision.

[30] The following passage of his judgment shows that the learned judge had also applied the proportionality principle where he stated:

> [42] It is my judgment that, based on the facts and circumstances of the case, the usage of the word "Allah" particularly in the Malay version of the Herald, is without doubt, do have the potential to disrupt the even tempo of the life of the Malaysian community. Such publication will surely have an adverse effect upon the sanctity as envisaged under Article 3(1) and the right for other religions to be practiced in peace and harmony in any part of the Federation. Any such disruption of the even tempo is contrary to the hope and desire of peaceful and harmonious co-existence of other religions other than Islam in this country.
>
> [43] Based on the reasons given by the Minister in his Affidavit In Reply, it is clear that he was concerned with national security and public order.
>
> [44] *When such exercise of discretion by the Minister becomes a subject of a judicial review, it is the duty of the court to execute a balancing exercise between the requirement of national security and public order*

with that of the interest and freedom of the respondent. As a general principle, as decided by case law, the courts will give great weight to the views of the executive on matters of national security. It is suffice to refer to what Lord Woolf CJ said in *A, X and Y v. Secretary of State for the Home Department* [2004] QB 335, which reads as follows:

> Decisions as to what is required in the interest of national security are self-evidently within the category of decisions in relation to which the court is required to show considerable deference when it comes to judging those actions. (emphasis added)

[31] Similarly in the judgment of Abdul Aziz Rahim JCA, even though he spoke of the subjective test, he considered at length the reasons furnished by the Minister in arriving at his decision. He came to the conclusion that having regard to the circumstances of the case, the Minister had exercised his discretion reasonably.

[32] From the concluding paragraph of his judgment, it is apparent that the learned judge had in fact applied the objective test, where he said:

> [42] … I would answer the first issue in the affirmative that is the Minister's decision of 7.1.2009 is valid and lawful in that it has passed the test of *Wednesbury* principle of reasonableness in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 KB 223 and that it has not contravened the principles of illegality, procedural impropriety, proportionality and irrationality as enunciated in *Council of Civil Service Unions & Ors v. Minister of Civil Service* [1985] 1 AC 374.

[33] Premised on the above, I hold that the Court of Appeal had indeed applied the objective test in arriving at its decision. Had it applied the subjective test, as suggested by learned counsel for the applicant, it would not have been necessary for the Court of Appeal to consider the substance of the Minister's decision.

[34] Since it is my finding that the Court of Appeal in the instant case had applied the correct test, hence it is not open for us to interfere with the finding of the Court of Appeal. In this regard, I wish to add that even if this court does not agree with the findings of the Court of Appeal that is not sufficient reason for us to grant leave. As rightly stated by Zaki Tun Azmi CJ in *Terengganu Forest* (*supra*):

> [31] Section 96(a) does not mention achieving justice or to correct injustice or to correct a grave error of law or facts as grounds for granting leave to appeal. Every applicant would inevitably claim he has suffered injustice but the allegation of injustice by itself should not be a sufficient reason for leave to be granted.

[35] For the above reasons, I hold that the questions of law posed in Part A failed to pass the threshold under s. 96(a) of the CJA.

Part B: Constitutional Law Questions

Constitutionality Of The State Enactments

[36] Learned counsel for the applicant contended that the scope and effect of arts. 3, 8, 10, 11 and 12 of the Federal Constitution were considered by both the High Court and the Court of Appeal, forming the subject matter of the declaratory orders, issued by the High Court which were subsequently set aside by the Court of Appeal. That being the case, he contended that the constitutional questions posed by the applicant in Part B fall squarely within s. 96(b) of the CJA and for that reasons, leave ought to be granted.

[37] The Minister in his affidavit stated that he had taken into consideration s. 9 of the various State Enactments (the impugned provision) which seeks to control and restrict the propagation of non-Islamic religious doctrines and belief amongst Muslims. The impugned provision was enacted pursuant to cl. (4) of art. 11 and Para. 1, List II (State List), Ninth Schedule of the Federal Constitution. To better appreciate the issue, let us consider s. 9 of the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988 (Selangor Enactment No. 1/1988). The said section reads:

> 9. (1) A person commits an offence if he:
>
> (a) in any published writing; or
>
> (b) in any public speech or statement; or
>
> (c) in any speech or statement addressed to any gathering of persons; or

(d) in any speech or statement which is published or broadcast and which at the time of its making he knew or ought reasonably to have known would be published or broadcast.

uses any of the words listed in Part I of the Schedule, or any of its derivatives or variations, to express or describe any fact, belief, idea, concept, act, activity, matter, or thing of or pertaining to any non-Islamic religion.

(2) A person who is not a Muslim commits an offence if he, in the circumstances laid down in subsection (1), uses any of the expressions listed in Part II of the Schedule, except by way of quotation or reference.

(3) A person who commits an offence under subsections (1) or (2) shall, on conviction, be liable to a fine not exceeding one thousand ringgit.

(4) The Ruler in Council may, by order published in the Gazette, amend the Schedule.

One of the words listed in Part I of the Schedule is the word "Allah". Similar provisions are found in other State Enactments.

[38] In the High Court, the applicant challenged the validity or constitutionality of the impugned provision. The learned High Court Judge upheld the challenge and she considered the issue at some length. In her judgment, she stated:

[52] Mr Royan drew to the court's attention (i) that art. 11(4) which is the restriction does not state that state law can forbid or prohibit but 'may control or restrict'; does not provide for state law or any other law to control or restrict the propagation of any religious doctrine or belief among persons professing a religion other than Islam; the word 'propagate' means 'to spread from person to person, ... to disseminate ... (... belief or practise, etc)' citing *Rev Stainislaus v. State of Madhya Pradesh & Ors* [1977] AIR 908 (SC) at p. 911 left column. Mr Royan submits *ex facie*, s. 9 of the state Enactments make it an offence for a person who is not a Muslim to use the word "Allah" except by way of quotation or reference; so it appears that a Christian would be committing an offence if he uses the word "Allah" to a group of non-Muslims or to a non-Muslim individual. Mr. Royan then argues that that cannot be the case because art. 11(4) states one may 'control or restrict the propagation of any religious doctrine

or belief among persons professing the religion of Islam'. I am persuaded such an interpretation would be ludicrous as the interpretation does not accord with the object and ambit of art. 11(4) of the Federal Constitution.

[53] I find there is merit in Mr Royan's submission that unless we want to say that s. 9 is invalid or unconstitutional to that extent (which I will revert to later), the correct way of approaching s. 9 is it ought to be read with art. 11(4). If s. 9 is so read in conjunction with art. 11(4), the result will be that a non-Muslim could be committing an offence if he uses the word "Allah" to a Muslim but there would be no offence if it was used to a non-Muslim. Indeed art. 11(1) reinforces this position as it states 'Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it'. Clause 4 restricts a person's right only to propagate his religious doctrine or belief to persons professing the religion of Islam. So long as he does not propagate his religion to persons not professing the religion of Islam, he commits no offence. It is significant to note that art. 11(1) gives freedom for a person to profess and practise his religion and the restriction is on the right to propagate.

...

[57] ... *On the other hand the object of art. 11(4) and the state Enactments is to protect or restrict propagation to persons of the Islamic faith. Seen in this context by no stretch of imagination can one say that s. 9 of the state Enactments may well be proportionate to the object it seeks to achieve and the measure is therefore arbitrary and unconstitutional. Following this it shows the first respondent has therefore taken an irrelevant consideration*. (emphasis added)

She further held:

[80] With regard to the contention that the publication permit is governed by the existence of the state Enactments pertaining to the control and restriction of the propagation of non-Islamic religions among Muslims, *it is open to the applicant in these proceedings to challenge by way of collateral attack the constitutionality of the said Enactments on the ground that s. 9 infringe the applicant's fundamental liberties under arts. 3, 10, 11 and 12 of the Federal Constitution*. (emphasis added)

[39] The net effect of the finding of the learned High Court Judge is that the impugned provision is invalid, null and void, and unconstitutional as it exceeds the object of art. 11(4) of the Federal Constitution. The respective States' Legislature thus have

no power to enact the impugned provision. The issue is, could the High Court Judge entertain such a challenge in light of specific procedure in cls. (3) and (4) of art. 4 of the Federal Constitution. Clauses (3) and (4) of art. 4 provide:

> 4(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or:
>
> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) If the law was made by the Legislature of a State, in proceedings between the Federation and that State.
>
> (4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[40] Clauses (3) and (4) of art. 4 of the Federal Constitution came for consideration of this court in *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112 (FC), where Suffian LP held as follows:

> Under our Constitution written law may be invalid on one of these grounds:
>
> (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which (sic) respect to which the State legislature has no power to make law, article 74; or
>
> (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or
>
> (3) in the case of State written law, because it is inconsistent with Federal law, article 75.
>
> The court has power to declare any Federal or State law invalid on any of the above three grounds.

The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.

But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

First, clause (3) of article 4 provides that the validity of any law made by Parliament or by a State legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:

(a) in proceedings for a declaration that the law is invalid on that ground; or

(b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or

(c) if the law was made by a State legislature, in proceedings between the Federation and that State.

It will be noted that proceedings of types (b) and (c) are brought by Government, and there is no need for any one to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. Proceedings of type (a) may however be brought by an individual against another individual or against Government or by Government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.

Secondly, clause (4) of article 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a Judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, clause (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is invalid on the ground that

A it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in land.

B The present case may be classified as the proceedings of type (a) as illustrated by Suffian LP in *Ah Thian* (*supra*). Therefore, the party seeking to challenge the validity or constitutionality of the impugned provision must specifically ask for a declaration that the law is invalid, and such a proceeding may only be commenced C with leave of a judge of the Federal Court. Further, the respective State must be made party so as to give the state an opportunity to defend the validity or constitutionality of the impugned provision. And art. 128 of the Federal Constitution provides that the Federal Court shall have the exclusive jurisdiction in such D matter.

(See also *Yeoh Tat Thong v. Government of Malaysia & Anor* [1973] 1 LNS 180; [1973] 2 MLJ 86 (FC); *Syarikat Banita Sdn Bhd v. Government of State of Sabah* [1977] 1 LNS 125; [1977] 2 MLJ E 217 (FC); *East Union (Malaya) Sdn Bhd v. Government of State of Johore & Government of Malaysia* [1980] 1 LNS 18; [1980] 2 MLJ 143 (FC); *Rethana M Rajasigamoney v. The Government of Malaysia* [1984] 1 CLJ 352; [1984] 1 CLJ (Rep) 323 (FC); and *Fathul Bari Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors* F [2012] 4 CLJ 717; [2012] 1 CLJ (Sya) 233 (FC)).

[41] The underlying reasons behind cls. (3) and (4) of art. 4 of the Federal Constitution was explained in *Abdul Karim Abdul Ghani v. The Legislative Assembly of the State of Sabah* [1988] 1 CLJ 460; G [1988] 1 CLJ (Rep) 1 (SC), where Hashim Yeop Sani SCJ observed:

Article 4(3) and (4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the legislature being questioned on the ground mentioned in that H article incidentally. The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific declaration of invalidity in order to secure that frivolous or vexatious proceedings for such declarations are not commenced. Article 4(4) requires that the leave of a Judge of the Supreme Court must first be obtained. I

[42] The effect of cls. (3) and (4) of art. 4 as explained by the Supreme Court in *Abdul Karim Abdul Ghani* (*supra*) is that the validity or constitutionality of the laws could not be questioned by way of collateral attack, as was done in the present case. This is to prevent any frivolous or vexatious challenge being made on the relevant legislation. Clause (3) of art. 4 provides that the validity or constitutionality of the relevant legislation may only be questioned in proceedings for a declaration that the legislation is invalid. And cl. (4) of art. 4 stipulates that such proceedings shall not be commenced without the leave of a judge of the Federal Court. This procedure was followed in a number of cases. (See *Fathul Bari Mat Jahya* (*supra*); *Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases* [2009] 2 CLJ 54 (FC); *Mamat Daud & Ors v. The Government of Malaysia* [1986] 2 CLJ 118; [1986] CLJ Rep 190 (SC)).

[43] Premised on the above, I hold that the High Court Judge ought not to have entertained the challenge on the validity or constitutionality of the impugned provision for two reasons, namely procedural non-compliance and for want of jurisdiction. The findings of the High Court Judge that the impugned provision is unconstitutional was rightly set aside by the Court of Appeal.

[44] The constitutional questions posed in Part B of this application concern the rights as guaranteed by arts. 3, 8, 10, 11 and 12 of the Federal Constitution. However, I must emphasise that these questions relate to the usage of the word "Allah" in the Herald. I am of the view that these questions could not be considered in isolation without taking into consideration the impugned provision. As it is my finding that a challenge on the validity and constitutionality of the impugned provision could not be made for the reasons stated earlier, therefore, it is not open to this court to consider the questions posed in Part B.

Part C: General Questions

[45] The questions in Part C relate to theological issues arising directly from the judgments of the learned judges of the Court of Appeal. From the facts, it is clear that the Minister's decision was never premised on theological consideration. Therefore, the views expressed by the learned judges of the Court of Appeal on those issues are mere *obiter*. For that reason, the questions in Part C in my view do not pass the threshold under s. 96(a) of the CJA.

Decision

[46] Based on the foregoing, the application is dismissed.

[47] My learned brothers Raus Sharif (PCA), Zulkefli Ahmad Makinudin (CJM) and Suriyadi Halim Omar (FCJ) have read this judgment in draft and have expressed their agreement with it.

[48] No order as to costs.

APPENDIX

PART A: ADMINISTRATIVE LAW QUESTIONS

(i) Where the decision of a Minister is challenged on grounds of illegality or irrationality and/or *Wednesbury* unreasonableness, whether it would be incumbent on the minister to place before the Court the facts and the grounds on which he had acted?

(ii) Whether the decision of a Minister is reviewable where such decision is based on ground of alleged national security and whether it is subjective discretion? Is the mere assertion by the Minister of a threat to public order, or the likelihood of it, sufficient to preclude inquiry by the Court?

(iii) Whether in judicial review proceedings a Court is precluded from enquiring into the grounds upon which a public decision maker based his decision?

(iv) Where the decision of the Minister affects or concerns fundamental rights, whether the Court is obliged to engage in a heightened on close scrutiny of the *vires* and reasonableness of the decision?

(v) Where the characterization of the Minister's discretion as an absolute discretion precludes judicial review of the decision?

(vi) Whether the decision by the Minister to prohibit the use of the word "Allah" is inherently illogical and irrational in circumstances where the ban is restricted to a single publication of the restricted group while its other publications may legitimately carry the word?

(vii) Whether the use of a religious publication by a religious group within its private place of worship and for instruction amongst its members can rationally come within the ambit of a ministerial order relating to public order or national security?

(viii) Can the Executive/State which has permitted the use of the word "Allah" in the Al-Kitab prohibit its use in the Bahasa Malaysia section of the Herald – a weekly newspaper of the Catholic Church ('the Herald'), and whether the decision is inherently irrational?

(ix) Whether it is legitimate or reasonable to conclude that the use of the word "Allah" in the Herald which carries a restriction 'for Christians only' and 'for circulation in church' can cause confusion amongst those in the Muslim community?

(x) Whether the claims of confusion of certain persons of a religious group could itself constitute threat to public order and national security?

PART B: CONSTITUTIONAL LAW QUESTIONS

(i) Whether Article 3(1) of the Federal Constitution is merely declaratory and could not by itself impose any qualitative restriction upon the fundamental liberties guaranteed by Article 10, 11(1), 11(3) and 12 of the Federal Constitution?

(ii) Whether in the construction of Article 3(1) it is obligatory for the Court to take into account the historical constitutional preparatory documents, namely, the Reid Commission Report 1957, the White Paper 1957 and the Cobbold Commission Report 1962 (North Borneo and Sarawak) that the declaration in Article 3(1) is not to affect freedom of religion and the position of Malaya or Malaysia as a secular state?

(iii) Whether it is appropriate to read Article 3(1) to the exclusion of Article 3(4) which carries the guarantee of non-derogation from the other provisions of the Constitution?

(iv) Whether it is permissible reading of a written constitution to give precedence or priority to the articles of the constitution in the order in which they appear so that the Articles of the Federal Constitution that appear in Part I are now deemed to rank higher in importance to the Articles in Part II and so forth?

(v) Whether on a true reading of Article 3(1) the words 'other religions may be practiced in peace and harmony' functions as a guarantee to the non-Muslim religions and as a protection of their rights?

(vi) Whether on a proper construction of the Federal Constitution, and a reading of the preparatory documents, namely, the Reid Commissions Report (1957), the White Paper (1957)

A and the Cobbold Commission Report (1962), it could legitimately be said that Article 3(1) takes precedence over the fundamental liberties provisions of Part II, namely, Articles 8, 10, 11(1), 11(3) and 12 of the Federal Constitution?

(vii) Whether the right of a religious group to manage its own B affairs in Article 11(3) necessarily includes the right to decide on the choice of words to use in its liturgy, religious books and publications, and whether it is a legitimate basis to restrict this freedom on the ground that it may cause confusion in the minds of members of another religious C group?

(viii) Whether the avoidance of confusion of a particular religious group amounts to a public order issue to deny another religious group its constitutional rights under Articles 8, 10, 11(1), 11(3) and 12 of the Federal Constitution?

D

(ix) Whether it is reasonable or legitimate to conclude that the use of the word "Allah" for generations in the Al-Kitab (the Bahasa Malaysia/Indonesia translation of the Bible) and in the liturgy and worship services of the Malay speaking members of the Christian community in Malaysia, is not an integral E or essential part of the practice of the faith by the community?

(x) Whether the appropriate test to determine if the practice of a religious community should be prohibited is whether there are justifiable reasons for the state to intervene and not the 'essential and integral part of the religion' test currently F applied under Article 11(3)?

(xi) Whether the standards of reasonableness and proportionality which have to be satisfied by any restriction on freedom of speech in Article 10 and Article 8 is met by the arbitrary restriction on the use of the word "Allah" imposed by the G Minister of Home Affairs?

(xii) Whether it is an infringement of Articles 10 and 11 of the Federal Constitution by the Minister of Home Affairs to invoke his executive power to prohibit the use of a word by H one religious community merely on the unhappiness and threatened actions of another religious community?

(xiii) Whether the Latin Maxim '*salus populi est suprema lex*' (the welfare of the people is the supreme law) can be invoked without regard to the terms of the Federal Constitution and I the checks and balances found therein?

PART C: GENERAL QUESTIONS

(i) Whether it is appropriate for a court of law whose judicial function is the determination of legal-cum-juristic questions to embark *suo moto* on a determination of theological questions and of the tenets of comparative religions, and make pronouncements thereto?

(ii) Whether it is legitimate for the Court of Appeal to use the platform of 'taking judicial notice' to enter into the non-legal thicket of theological questions or the tenets of comparative religions?

(iii) Whether the Court in entitled *suo moto* to embark upon a search for supportive or evidential material which does not form part of the appeal record to arrive at its decision?

(iv) Whether the Court can rely on information gathered from internet research without first having determined the authoritative value of the source of that information or rely on internet research as evidence to determine what constitute the essential and integral part of the faith and practice of the Christians?

(v) Whether the use of research independently carried out by a Judge and used as material on which the judgment was based without it first been offered for comment to the parties to the proceedings is in breach of the principles of natural justice?

Richard Malanjum CJ (Sabah & Sarawak) (dissenting):

Introduction

[49] This is an application (encl. 2(a)) by the applicant for leave to appeal to this court pursuant to s. 96(a) and (b) of the Courts of Judicature Act 1964 ('the CJA').

[50] The applicant is dissatisfied with the decision of the Court of Appeal rendered on 14 October 2013 reversing the judgment of the High Court given in his favour on 31 December 2009.

[51] The applicant had by way of an application for Judicial Review No. R1-25-28-2009 dated 16 February 2009 ('the application for judicial review') applied to the High Court for leave pursuant to O. 53 r. 3(1) of the Rules of the High Court 1980 ('RHC'). The relief sought for were, *inter alia*, an order of *certiorari*, declarations, for stay of the decision, costs and any other relief.

[52] On 24 April 2009 the High Court granted leave. The Attorney General Chambers did not raise any objection.

Judgment At Leave Stage

[53] Generally in an application for leave to appeal under s. 96 of the CJA it is rare for this court to provide a comprehensive written judgment. The rationale for not doing so is obvious. It is merely an application for leave to appeal. The parties are not expected to argue on the merits of the case.

[54] The foregoing view was clearly expressed in *Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors* [1999] 1 CLJ 325. Mr Justice Edgar Joseph Jr FCJ had this to say in respect of s. 96(a) at pp. 330-332:

> **It is not the practice of this Court**, nor as we understand it, the practice of the House of Lords, when sitting in its judicial capacity hearing applications for leave to appeal, *to give explicit reasons for granting or refusing leave, save in circumstances where their Lordships considered that they had no jurisdiction to entertain the application.*
>
> ...
>
> *The only reason why we thought it desirable that we should give a judgment in writing in this case is because it affords us the opportunity to offer guidance, without in any way attempting to establish a rigid framework into which all new situations must be forced*, when considering applications for leave to appeal from the judgments of the Court of Appeal to this Court in civil matters ...
>
> ...
>
> *At the hearing of the application for leave, so far as it is possible to do so, the argument should be brief, succinct and concentrated* (emphasis added).

[55] Thus, an explicit written judgment by this court may be given even at the leave stage. However, it is usually given when jurisdiction is declined as for instance when the final appellate court is the Court of Appeal. (See: *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v. Kumar Gurusamy* [2011] 3 CLJ 241) or this court is of the view that there is a need to provide guidance on the exercise of its discretion under s. 96. (See: *Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor and Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25).

[56] In this present application there is no issue on lack of jurisdiction. Nevertheless, in view of the issues and the legal implications involved in this case, it is appropriate and as a guide, that a reasoned judgment should be issued even at this leave stage. Not so much on the merits of the issues involved but rather on the questions posed *vis-à-vis* the requirements of s. 96. Furthermore, this court was adjourned in order to deliberate after hearing the submissions of the parties.

Background

[57] The applicant had been the publisher of the "Herald - The Catholic Weekly" ('the Herald') for the past 14 years prior to the filing of the application for judicial review.

[58] The applicant received by way of facsimile a letter dated 7 January 2009 ('the said letter') signed by one Che Din bin Yusoh on behalf of the Secretary General of the Ministry of Home Affairs. The said letter approved the publication permit to the applicant to continue publishing the Herald subject to certain conditions, namely:

> (i) Permohonan penerbitan dalam Bahasa Melayu adalah dibenarkan, namun demikian, penggunaan kalimah "ALLAH" adalah dilarang sehingga mahkamah membuat keputusan mengenai perkara tersebut;
>
> (ii) Di halaman hadapan penerbitan ini, tertera perkataan 'TERHAD' yang membawa maksud penerbitan ini adalah terhad untuk edaran di gereja dan kepada penganut Kristian sahaja.

The said letter also cancelled an earlier letter from the Ministry of Home Affairs dated 30 December 2008 to the applicant on the same subject.

[59] It was condition (i) above ('the impugned decision') that triggered the applicant to file the application for judicial review. Basically the critical issue in contention relates to the exercise of power by the first respondent to prohibit the applicant as opposed to the right of the applicant to use the word "Allah" in the Bahasa Malaysia section of the Herald.

A **The High Court Judgment**

[60] Having heard the application for judicial review after leave was given the High Court granted the relief sought for by the applicant.

B **[61]** Basically the learned judge held:

(a) that s. 13A of the Printing Presses and Publication Act 1984 ('the Act') did not oust the judicial review to correct any error of law committed in the exercise of any discretion under the C Act or the Printing Presses and Publications (Licences and Permits) Rules 1984 ('the 1984 Rules');

(b) that the first respondent took into account irrelevant matters instead of relevant matters "in the exercise of his discretion to D impose further conditions in the publication permit". Further, based on the uncontroverted historical evidence averred by the applicant the first respondent had no factual basis to impose the additional conditions in the permit;

E (c) that the conditions imposed were illegal, null and void for the following reasons:

(i) although art. 3(1) of the Federal Constitution ('the FC') provides that Islam is the official religion of the Federation of Malaysia ('the Federation'), other religions may be F practised in peace and harmony in any part of the Federation;

(ii) it must be considered whether the use of the word "Allah" is a practice of the Christian religion; and

G (iii) based on the evidence the use of the word "Allah" is an essential part of the worship and instruction in the faith of the Malay speaking community of the Catholic Church and is integral to the practice and propagation of their faith.

H (d) that to prohibit the use of the word "Allah" in the Herald is unconstitutional:

(i) since it contravenes the provisions of arts. 3(1), 11(1) and 11(3) of the FC;

I (ii) an unreasonable restriction on the freedom of speech and expression under art. 10(1)(c) of the FC; and

(iii) an unreasonable administrative act offending the first limb of art. 8(1) of the FC which demands fairness in any form of State action.

(e) that based on merits the action of the respondents was illogical, irrational and inconsistent since the use of word "Allah" was already permitted for worship and in the Bible. Further, the reasons given by the first respondent in the various directives defied all logic and were unreasonable;

(f) that s. 9 of the various State Enactments which made it an offence to use certain words and expressions could be interpreted in two ways:

(i) to read it in conjunction with art. 11(4) of the FC; and

(ii) to apply the doctrine of proportionality, that is to test whether the "legislative state action, which includes executive and administrative acts of the State, was disproportionate to the object it sought to achieve". Thus, applying the test to the factual matrix of this case it ought to be taken into account the constitutional and fundamental rights of those persons professing the Christian faith and the fact that a large section of people in the Catholics church whose medium of instruction is Bahasa Malaysia and use the word "Allah" for their God.

(g) that the respondents did not have materials to support their contention that the usage of the word "Allah" by the Herald could cause a threat to national security;

(h) that "the court has to determine whether the impugned decision was in fact based on the ground of national security"; and

(i) that the subject matter referred to in the proceedings was justiciable contrary to the objections raised by the respondents.

The Decision Of The Court Of Appeal

[62] The learned judges of the Court of Appeal in rendering their respective judgments unanimously reversed the judgment of the High Court. Their respective judgments may be referred to in this judgment as and when necessary. But for now it may be

convenient just to reproduce the written summary of their decision as provided by the presiding judge, Mr Justice Apandi Ali JCA (as he then was). It stated thus:

> [1] Basically this is an appeal against the decision of the High Court arising from an application for judicial review of the imposition of a condition in the publication permit of the Herald – The Catholic Weekly. The impugned condition was the prohibition of the name "Allah" in the said publication. In the course of allowing the judicial review the learned High Court judge also allowed certain declaratory relief orders pertaining to the respondent's constitutional right to use the name "Allah".
>
> [2] The law on judicial review in this country is trite law; namely judicial review is not concerned with the merits of a decision but with the manner the decision was made; and that there are 3 categories upon which an administrative decision may be reviewed, ie, 1. Illegality; 2. Irrationality and 3. Procedural impropriety. When the decision involved an exercise of a discretion, the determinable issues depend on the facts of the case.
>
> [3] Applying the law to the facts and circumstances of the case and bearing in mind the principles to be taken in dealing with judicial review as laid down in the often-quoted case of *Council of Civil Service Union & Ors v. Minister for the Civil Service* [1985] 1 AC 374; [1984] 4 All ER 935, it is our considered finding that the Minister has not acted in any manner or way that merit judicial interference on his impugned decision.
>
> [4] On the constitutionality of the action of the 1st appellant to impose the impugned condition prohibiting the usage of the word "Allah" in the Herald, it is our judgment that there is no infringement of the any of the constitutional rights, as claimed by the respondent.
>
> [5] It is our common finding that the usage of the name "Allah" is not an integral part of the faith and practice of Christianity. From such finding, we find no reason why the respondent is so adamant to use the name "Allah" in their weekly publication. Such usage, if allowed, will inevitably cause confusion within the community.
>
> [6] In the circumstances and the facts of the case we are also mindful of the Latin maxims of "*salus populi suprema lax*" (the safety of the people is the supreme law) and "*salus republicae suprema lax*" (the safety of the state is the supreme law) do co-exist and relevant to the doctrine that the welfare of an

individual or group must yield to that of the community. It is also our reading that this is how the element of "in peace and harmony" in Article 3(1) is to be read with the freedom of religion in Article 11(1) of the Federal Constitution.

[7] On the evidence before us too we are satisfied that sufficient material have been considered by the Minister in discharging his function and statutory power under the Printing Presses And Publications Act 1984. Although the test under the written law is subjective, there are sufficient evidence to show that such subjective decision was derived by considering all facts and circumstances in an objective manner. Thus, there is no plausible reason for the High Court to interfere with the Minister's decision.

[8] The detailed explanations and reasons for our findings can be seen in the full text of three separate written judgments, which shall be made available to all parties immediately, at the conclusion of today's proceedings. My learned brothers, Abdul Aziz bin Abdul Rahim, JCA and Mohd Zawawi bin Salleh, JCA have read and approved my judgment. In addition to my judgment, both of my learned brothers have respectively written separate supporting judgments, of which I agree with their methodological analysis and findings.

[9] In the light of our findings, we are unanimous in our decision to allow the appeal by the appellants. Appeal is therefore allowed. All orders given on 31/12/2009 by the High Court pursuant to the Judicial Review application are hereby set aside. As agreed between all parties there will be no order as to costs.

The Application (Encl. 2(a))

[63] In seeking for leave the applicant submitted a set of proposed questions in three parts. They are as follows:

Part A: The Administrative Law Questions

1. Where the decision of a Minister is challenged on grounds of illegality or irrationality and/or *Wednesbury* unreasonableness, whether it would be incumbent on the Minister to place before the Court the facts and the grounds on which he had acted?

2. Whether the decision of a Minister is reviewable where such decision is based on ground of alleged national security and whether it is a subjective discretion? Is the mere assertion by the Minister of a threat to public order, or the likelihood of it, sufficient to preclude inquiry by the Court?

A

3. Whether in judicial review proceedings a Court is precluded from enquiring into the grounds upon which a public decision maker based his decision?

4. Where the decision of the Minister affects or concerns fundamental rights, whether the Court is obliged to engage in a heightened or close scrutiny of the vires and reasonableness of the decision?

B

5. Whether the characterization of the Minister's discretion as an absolute discretion precludes judicial review of the decision?

C

6. Whether the decision by the Minister to prohibit the use of the word "Allah" is inherently illogical and irrational in circumstances where the ban is restricted to a single publication of the restricted group while its other publications may legitimately carry the word?

D

7. Whether the use of a religious publication by a religious group within its private place of worship and for instruction amongst its members can rationally come within the ambit of a ministerial order relating to public order or national security?

E

8. Can the Executive/State which has permitted the use of the word "Allah" in the Al-Kitab prohibit its use in the Bahasa Malaysia section of the Herald – a weekly newspaper of the Catholic Church ('the Herald'), and whether the decision is inherently irrational?

F

9. Whether it is legitimate or reasonable to conclude that the use of the word "Allah" in the Herald which carries a restriction 'for Christians only' and 'for circulation in church' can cause confusion amongst those in the Muslim community?

G

10. Whether the claims of confusion of certain persons of a religious group could itself constitute threat to public order and national security?

H

Part B: The Constitutional Law Questions

1. Whether Article 3(1) of the Federal Constitution is merely declaratory and could not by itself impose any qualitative restriction upon the fundamental liberties guaranteed by Articles 10, 11(1), 11(3) and 12 of the Federal Constitution?

I

2. Whether in the construction of Article 3(1) it is obligatory for the Court to take into account the historical constitutional preparatory documents, namely, the Reid Commission Report 1957, the White Paper 1957, and the Cobbold Commission Report 1962 (North Borneo and Sarawak) that the declaration in Article 3(1) is not to affect freedom of religion and the position of Malaya or Malaysia as a secular state?

3. Whether it is appropriate to read Article 3(1) to the exclusion of Article 3(4) which carries the guarantee of non-derogation from the other provisions of the Constitution?

4. Whether it is a permissible reading of a written constitution to give precedence or priority to the articles of the constitution in the order in which they appear so that the Articles of the Federal Constitution that appear in Part I are now deemed to rank higher in importance to the Articles in Part II and so forth?

5. Whether on a true reading of Article 3(1) the words 'other religions may be practised in peace and harmony' functions as a guarantee to the non-Muslim religions and as a protection of their rights?

6. Whether on a proper construction of the Federal Constitution, and a reading of the preparatory documents, namely, the Reid Commission Report (1957), the White Paper (1957) and the Cobbold Commission Report (1962), it could legitimately be said that Article 3(1) takes precedence over the fundamental liberties provisions of Part II, namely, Articles 8, 10, 11(1), 11(3) and 12 of the Federal Constitution?

7. Whether the right of a religious group to manage its own affairs in Article 11(3) necessarily includes the right to decide on the choice of words to use in its liturgy, religious books and publications, and whether it is a legitimate basis to restrict this freedom on the ground that it may cause confusion in the minds of members of another religious group?

8. Whether the avoidance of confusion of a particular religious group amounts to a public order issue to deny another religious group its constitutional rights under Articles 8, 10, 11(1), 11(3) and 12 of the Federal Constitution?

9. Whether it is reasonable or legitimate to conclude that the use of the word "Allah" for generations in the Al-Kitab (the Bahasa Malaysia/Indonesian translation of the Bible) and in

A the liturgy and worship services of the Malay speaking members of the Christian community in Malaysia, is not an integral or essential part of the practice of the faith by the community?

B 10. Whether the appropriate test to determine if the practice of a religious community should be prohibited is whether there are justifiable reasons for the state to intervene and not the 'essential and integral part of the religion' test currently applied under Article 11(3)?

C 11. Whether the standards of reasonableness and proportionality which have to be satisfied by any restriction on freedom of speech in Article 10 and Article 8 is met by the present arbitrary restriction on the use of the word "Allah" imposed by the Minister of Home Affairs?

D 12. Whether it is an infringement of Articles 10 and 11 of the Federal Constitution by the Minister of Home Affairs to invoke his executive powers to prohibit the use of a word by one religious community merely on the unhappiness and threatened actions of another religious community?

E 13. Whether the Latin maxim '*salus populi est suprema lex*' (the welfare of the people is the supreme law) can be invoked without regard to the terms of the Federal Constitution and the checks and balances found therein?

Part C: General

F 1. Whether it is appropriate for a court of law whose judicial function is the determination of legal-cum-juristic questions to embark *suo moto* on a determination of theological questions and of the tenets of comparative religions, and make pronouncements thereto?

G 2. Whether it is legitimate for the Court of Appeal to use the platform of 'taking judicial notice' to enter into the non-legal thicket of theological questions or the tenets of comparative religions?

H 3. Whether the Court is entitled *suo moto* to embark upon a search for supportive or evidential material which does not form part of the appeal record to arrive at its decision?

4. Whether the Court can rely on information gathered from internet research without first having determined the I authoritative value of the source of that information or rely on internet research as evidence to determine what constitute the essential and integral part of the faith and practice of the Christians?

5. Whether the use of research independently carried out by a Judge and used as material on which the judgment was based without it first been offered for comment to the parties to the proceedings is in breach of the principles of natural justice?

Contentions Of The Parties

[64] In respect of Part A proposed questions learned counsel for the applicant began his submission by highlighting the uncertainty in the source of power under which the first respondent imposed the conditions as stipulated in the said letter including the impugned decision. The first respondent was silent in his source of power while the judges of the Court of Appeal were diverged.

[65] Learned counsel pointed out that Mr Justice Abdul Aziz JCA held the power was to be found in s. 12 of the Act together with the Form B conditions while Mr Justice Mohd Apandi Ali JCA (as he then was) relied on s. 26, or the implied power under s. 40 of the Interpretation Act 1967 as the source of the power.

[66] Thus it was submitted that the source of the Minister's power to impose a ban on the use of a word by a religious body should be clearly settled by this court.

[67] It was further submitted that leave should be granted for the following reasons:

(i) The decision of the Court of Appeal in this case could not be reconciled with an earlier decision of the same court dealing with the same provision of the Act. In *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* [2012] 9 CLJ 297 the Court of Appeal affirmed the lifting on the ban of a book said to cause 'confusion' in the minds of women in the Muslim community since "no evidence of actual prejudice to public order was produced" and that "the book had been in circulation for two years before the ban";

(ii) The Court of Appeal in this case applied the subjective test as the applicable test for the Act without any consideration to the post – *Karam Singh* decisions (see: *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs),*

Malaysia [1969] 1 LNS 65; [1969] 2 MLJ 129) such as *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309; [2002] 4 MLJ 449; *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300; *Chng Suan Tze v. The Minister of Home Affairs & Ors and Other Appeals* [1988] 1 LNS 162; [1989] 1 MLJ 69 (Singapore case)) which adopted the objective test;

(iii) There is a prevailing confusion in the courts below as to the applicable test in the exercise of an administrative or ministerial power especially relating to a decision of the first respondent under the Act. Is it a subjective test or an objective test or a fusion of the two? The 'fusion test' as propounded in *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors* [2013] 1 LNS 296; [2013] 5 MLJ 174 was not supported by any case authority;

(iv) The Court of Appeal applied the *Wednesbury* reasonableness principle based on 'subjectively objective' test which is a contradiction in terms as it incorporates two concepts that cancel out each other;

(v) The Court of Appeal reverted to the anachronistic concept of absolute discretion instead of adopting the current trend that all discretionary power is subject to review as decided in several cases. (See: *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135; *YB Menteri Sumber Manusia v. Association of Banks Officers, Peninsular Malaysia* [1999] 2 CLJ 471; [1999] 2 MLJ 337);

(vi) The Court of Appeal adopted the pre-Rama Chandran (*R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, FC) concept of judicial review and failed to consider the current law that permits review in the substance as well as in the process when determining the reasonableness of a decision by a public authority. (See: *Datuk Justine Jinggut v. Pendaftar Pertubuhan* [2012] 1 CLJ 825). In view of the varying approach taken by the Court of Appeal in this case it is only appropriate that the Federal Court should re-look at the issue;

(vii) The Court of Appeal in coming up with its decision relied on the mere declaration by the first respondent as having acted on public order or national security thus precluded review instead of being satisfied as to the reasonableness of the action premised on the material upon which the first respondent acted;

(viii) There is a need to determine what is the current administrative law pertaining to the exercise of power on the ground of public order and national security in view of what was said by Abdoolcader SCJ in *John Peter Berthelsen v. Director-General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 at p. 166; [1987] 1 MLJ 134 at p. 138: ... "no reliance can be placed on a mere *ipse dixit* of the first respondent (the Director General)" and "in any event adequate evidence from responsible and authoritative sources would be necessary";

(ix) In administrative law there is a distinction between an unreasonable decision and a decision made in bad faith yet the Court of Appeal did not deem it significant when it held that there was no assertion by the applicant that the first respondent acted *mala fide*;

(x) There is a need to consider the current developments in administrative law which recognizes that "where fundamental rights are allegedly violated by ministerial or executive orders the courts are obliged to engage in 'a closer or heightened scrutiny' of the reasonableness of the decision' on *Wednesbury* grounds (See: *Associated Provincial Picture Houses, Limited v. Wednesbury Corporation* [1948] 1 KB 223) or independent of it";

(xi) Whether the occurrences of disturbance or disorder post-High Court judgment could justify the ban as ruled by the Court of Appeal. "Judicial review is concerned with the reasonableness of the decision at the time of the decision". (See: *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeal* [1997] 1 CLJ 665; [1996] 1 MLJ 481);

(xii) Whether proportionality is a determining factor in considering the reasonableness of the first respondent's decision as done by the Court of Appeal in *Datuk Justine Jinggut* (*supra*) and *Muhammad Hilman Idham v. Kerajaan Malaysia & Ors* [2011] 9 CLJ 50; and

(xiii) The Court of Appeal failed to maintain a proper balance between competing interests as seen in the way it handled the 'public order' and 'confusion' issue. It did not reflect the measured approach taken by our courts in previous cases where there was a determination by the courts on whether the ground proffered by the Minister could legitimately be a 'public order' ground. (See: *Minister for Home Affairs, Malaysia & Anor v. Jamaluddin Othman* [1989] 1 CLJ 1044; [1989] 1 CLJ (Rep) 105; [1989] 1 MLJ 418; *Sisters in Islam v. Syed Hamid Albar* [2010] 2 MLJ 377).

[68] In rebuttal the learned Senior Federal Counsel ('the SFC') appearing for the first and second respondents submitted as follows:

(i) That the applicant was only challenging the condition (i), that is, on the use of the word "Allah" in the Bahasa Malaysia section of the Herald;

(ii) That "upon reading the judgments of the three judges of the Court of Appeal, the obvious conclusion is that the appeal concerns with and only with a judicial review of a Minister's decision which was based on public security and public order consideration";

(iii) That "the cardinal principle governing the approach by the courts when reviewing the decision of a public authority is that judicial review is only concerned with the decision making process and not on the decision itself";

(iv) That "the Court of Appeal in allowing the respondents' appeal had looked at the facts of the case and available evidence and found that the Minister's decision to impose the conditions are on grounds of national security and public order". As such that the principle in relation to reviewing matters of national security and public order applies in this circumstance and this principle is already a settled law;

(v) That accordingly the proposed questions (1), (3), (5), (6), (8) and (10) do not meet the requirements of s. 96 of the CJA and the guiding principles in *Terengganu Forest*'s case (*supra*). The proposed questions do not raise any issue on national security and public order;

(vi) That the proposed question 2 'calls for this court to deliberate on a set of facts peculiar to this case';

(vii) That only the government can decide on matter of national security having access to the necessary information. (See: *Council of Civil Service Unions & Ors v. Minister of Civil Service* [1985] AC 374);

(viii) That in *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81 it was held that on issue of national security the subjective test applied on the satisfaction of the Minister;

(ix) The law on review over matters of national security and public order was settled in the case of *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309. Thus the proposed question 4 is unnecessary; and

(x) That the issue in proposed questions 7 and 9 was not an issue before the Court of Appeal since condition (ii) in the said letter was not challenged.

[69] In their common submission the third to ninth respondents basically submitted the following points:

(i) That being the respective heads of the religion of Islam absolute discretionary power rests upon the Yang Di-Pertuan Agong in the non-ruler States and upon the rulers in order to protect the religion, including the power to impose restrictions on the propagation of other religions to Muslims. The exercise of such power is non-justiciable;

(ii) That the impugned decision was made on national interest and public order;

(iii) That the right given to the applicant was subject to national security;

(iv) That under the Interpretation Act 1967 the power to give licence includes the power to add conditions;

(v) That there was no allegation of *mala fide* in the first respondent's action; and

(vi) That the first respondent did not act irrationally, unreasonably or illegally.

[70] The additional points submitted by the eighth respondent were these:

(i) That the onus was on the applicant to prove that the meaning of the word 'God' is "Allah";

(ii) That the decision of the first respondent was consonant with arts. 3 and 11 of the FC; and

(iii) That art. 3(1) of the FC imposes upon the government an obligation to protect the religion of Islam so that there is no confusion in the use of the word "Allah" by the Christian religion.

[71] As for the ninth respondent it was submitted thus:

(i) That the word "Allah" is not an integral part of the Christian religion in the same way as it is for Islam. For the former it is merely a translation issue while for the latter it is the God for Muslims;

(ii) That art. 11 (1) of the FC must be read together with arts. 3(1), 3(5), 11(4) and 11(5) "in order to strike a balance and harmony especially in the circumstances where the subject matter has a profound effect to the religion of Islam". As such the prohibition on the use of the word "Allah" by the Herald is not unconstitutional;

(iii) That art. 11(5) of the FC does not authorize any act contrary to any general law relating to public order, public health or morality. Further, "the practice of other religions must be in harmony with the position of Islam" being the dominant religion of the Federation as provided for under art. 11(4);

(iv) That the features which give rise to the constitutional identity of the FC are Islam, Malay Rulers and Malay elements; and

(v) That there is no evidence to indicate that the use of the word "Allah" is "essential part of worship and instruction in the faith of the Malay (Bahasa Malaysia) speaking community in the Catholic Church in Malaysia".

Analysis And Findings

The Law

[72] In considering encl. 2(a) it is important to bear in mind the basic guiding legal principles involved in leave application, the relevant administrative law principles in judicial review application and to a certain extent constitutional interpretation principles.

For Leave Application

[73] Section 96(a) and (b) of CJA reads:

> 96. Conditions of appeal
>
> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
>
> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[74] In *Kredin Sdn Bhd v. OCBC Bank (Malaysia) Bhd* [1998] 2 CLJ 797; [1998] 3 MLJ 78 it was held that "in a civil cause or matter, leave to appeal from the Court of Appeal to the Federal Court is a matter of discretion and not of right". However, it is also important to note the other observations by Edgar Joseph Jr FCJ, namely:

(a) That based on the opening words in s. 96 it is clear that the conditions upon which leave to appeal may be granted is subject to the "rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal";

(b) That the applicable rule is the Rules of the Federal Court 1995;

(c) That "there is no rule requiring the application for leave to set forth shortly the facts and points of law, and to conclude with a summary of reasons for leave being granted";

(d) That s. 96 provides a discretionary power in order to prevent frivolous and needless appeals and "to avoid overburdening the court of last resort with a spate of appeals if it is as of right".

[75] Section 96(a) of CJA also came under scrutiny in this court quite recently. In *Terengganu Forest Products Sdn Bhd* (*supra*) Zaki Azmi CJ said that it was necessary in order "to resolve inconsistencies in the judgments" of *Datuk Syed Kechik*'s case (*supra*) and *Joceline Tan Poh Choo & Ors v. V Muthusamy* [2009] 1 CLJ 650; [2008] 6 MLJ 621. And the learned Chief Justice preferring the decision in the former case went on to state the following:

(a) That leave "is granted if there are reasonable prospects of success";

(b) That the test is "whether the appeal – if leave were given – would lead to a just and reasonably prompt resolution of the real issue between the parties";

(c) That "leave will not be given if the decision would be purely academic";

(d) That to "obtain leave it must be shown that it falls under either of the two limbs of s. 96(a) but they can also fall under both limbs". Otherwise "the purpose of s. 96 is not to allow for correction of ordinary errors committed by the lower courts as would in an appeal as of right, particularly where the relevant laws are well settled";

(e) That mere "allegation of injustice by itself should not be a sufficient reason for leave to be granted. But once leave is granted on any one or more grounds discussed in this judgment this court can of course hear any allegation of injustice"; and

(f) That "leave to appeal against interpretation of statutes will not be given unless it is shown that such interpretation is of public importance".

[76] Indeed in *Datuk Syed Kechik*'s case (*supra*) Edgar Joseph Jr FCJ opined: A

(a) That "the circumstances for granting leave applications in the Federal Court appear to be limited to the two situations stated" in s. 96(a); B

(b) That the "paramount consideration is, of course, that the judgment of the Court of Appeal must in the language of s. 96(a) raise a question of general principle not previously decided by the Federal Court or a question of importance on which further argument and a decision of the Federal Court would be to public advantage **but** these criteria are, in our view, not exclusive"; (emphasis added). C

(c) That an "assessment of the prospects of success should leave be given is, of course, an important factor which the Federal Court would have to take into accoun"; and D

(d) That "an application for leave should be dismissed not so much on the case – although that may have a bearing on the result of the application – *as on the degree of public importance and on the necessity of the legal issue being finally resolved by the Federal Court*". (emphasis added). E

[77] As regards s. 96(b) there is hardly any judgment of this court that dealt with it. But it should be given the same approach as s. 96(a), *inter alia*, to consider "the degree of public importance and on the necessity of the legal issue being finally resolved by the Federal Court". Its application is not impeded by any other rules other than as discussed in *Kredin Sdn Bhd* (*supra*). F

[78] Thus, based on the above guidelines or criteria but which are not exclusive, it may be said that there are some critical factors which should not be overlooked when considering an application for leave under s. 96, namely: G

(a) That the issues involved are of sufficient importance and novelty that clarification of the law is in public interest; or H

(b) That 'the degree of public importance and on the necessity of the legal issue being finally resolved by' this court; or

I

(c) That there may be two or more different judgments of the Court of Appeal which are in direct conflict against each other. As such a decision of the Federal Court is necessary to determine which of the conflicting judgments should be subsequently followed or otherwise.

[79] It is interesting to note the approach by the courts in some other common law jurisdictions on the issue of leave application. In summary, it seems the common requirements in the granting of leave to appeal are that it is in the interest of justice and the question is one of general importance in which further argument and a decision of the court would be of public advantage.

[80] In *Ex Parte Gilchrist, In Re Armstrong* (1886) 17 QBD 521 at p. 528 Lord Esher, MR, said: "Merely to say that they are satisfied their decision is right is not, I venture to suggest, a sufficient reason for refusing leave to appeal, when the question involved is one of principle and they have decided it for the first time. If that was carried to its legitimate conclusion, they ought to refuse leave to appeal in every case".

[81] And in *Buckle v. Holmes* (1926) 2 KB 125 Banks LJ at p. 127 said this:

> **We gave leave to appeal in this case, not because we thought there was any real doubt about the law**, but because the question was one of general importance and one upon which further argument and a decision of this Court would be to the public advantage. (emphasis added)

[82] The New Zealand High Court was more elaborate in its requirements as shown in the case of *Ramsay v. Accident Compensation Corporation* [2004] NZAR 1. It was held that the purpose of special leave was to ensure sensible use of scarce judicial time. Ultimately it was a matter of discretion for the court but normally an applicant had to show that a principle or considerable amount was at stake, a reasonable prospect of success (or an error of law capable of *bona fide*, serious argument) and that leave was required in the interests of justice. Special leave was significant, not granted as a matter of course. Further, a "question of law included whether a statutory provision was properly construed or applied to the facts; a mixed question of law and fact; a decision supported by no evidence or evidence inconsistent with and contradictory of the decision or where the

only reasonable conclusion contradicted the decision; a conclusion not reasonably open to the judge; and whether evidence was relevant to the particular issue". A

For Judicial Review Application

[83] As regards the relevant administrative law principles applicable in judicial review application, the traditional governing principle was that it did not allow the court to make findings of fact on matters within the province of a Minister or to substitute the discretion of a Minister with the court's discretion. "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power" per Lord Brightman in *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141. Nevertheless the court may quash a decision by a Minister if he failed to interpret or apply the law correctly, if he failed to take into account matters which he was required by law to consider or took into account matter which he was not required by law to consider or where his decision was so irrational or perverse that no reasonable Minister could have made it. (See: *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* (*supra*)). B C D E

[84] In our jurisprudence the current governing principle is that an "inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law ... If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision". "... It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law". F G H I

(See: *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317 at p. 342 per Gopal Sri Ram JCA (as he then was); *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369). There have also been some positive developments in our administrative law thus expanding the traditional principle. (See: *R Rama Chandran v. Industrial Court of Malaysia & Anor* (*supra*); *Datuk Justine Jinggut v. Pendaftar Pertubuhan* (*supra*)).

Part A Proposed Questions

[85] Now, having perused the proposed questions in Part A and having considered the submissions of all the parties the issue is whether the points raised by the applicant have satisfied the requirements of s. 96(a).

[86] On the materials before this court there is merit in the submission on the source of power of the first respondent in stipulating the conditions in the said letter including the impugned decision. The said letter did not state the provision of the law under which those conditions including the impugned decision were made. In fact the said letter merely stated that the application for the publication permit was approved subject to the conditions stipulated therein. As such it is an important point to be considered by this court in order to clear the uncertainty since even the judges of the Court of Appeal were diverged. It goes to the root of whether the first respondent has the absolute discretion to make the impugned decision impervious of judicial review. If he had not exercised his power under an appropriate provision of the law then the impugned decision and the decision of the Court of Appeal upholding it could be called into question. Further, whatever the source of power arts. 8, 10, 11 and 12 of the FC are to be superimposed on and to be read into the first respondent's powers under the Act. Accordingly, leave should be granted on this point under the proposed question 5 of Part A or alternatively this court is not constrained to formulate a question on the point when granting leave. (See: *Terengganu Forest Products Sdn Bhd* (*supra*)).

[87] Next, there are divergent views not only between the parties in this case but also in the decisions of the Court of Appeal on the scope and nature of power of the first respondent under the Act.

[88] In *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* [2012] 9 CLJ 297 the Court of Appeal when considering s. 7(1) of the Act opined that although the power to ban the book entitled "*Muslim Women and the Challenges of Islamic Extremism*" ('the book') was at the absolute discretion of the Minister, such exercise of discretion was dependent upon him being satisfied "as to these precedent objective facts", namely, that the book or any part of it was:

(i) in any manner prejudicial to or likely to be prejudicial to public order, morality, security; or

(ii) likely to alarm public opinion; or

(iii) likely to be contrary to any law; or

(iv) likely to be prejudicial to public interest or national interest.

[89] In dismissing the appeal the Court of Appeal held that "the learned judge conducting the judicial review examined s. 7(1) and apprised himself of the precedent objective facts before the absolute discretion arose to be exercised. Then taking into consideration the fact not disputed that the book had been in circulation for two years before the order to prohibit it was made, and that there was no evidence shown of prejudice to public order during that period, the learned judge questioned the exercise of the discretion and quashed the order to prohibit the book. It was clearly an examination confined to the decision-making process as to whether it was illegal, or irrational in the particular circumstances".

[90] Obviously the Court of Appeal did not simply accept the claim of absolute discretion by the Minister to be beyond the tentacles of judicial review and that he could exercise it with such impunity. Indeed no discretion can be absolute. (See: *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* (*supra*)).

[91] Accordingly, the first respondent in exercising his power under the Act must act in accordance with law that includes the FC, the supreme law of the Federation. Thus, any exercise of power must be justified both under the Act and under the FC.

[92] But in *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors* [2013] 1 LNS 296 the Court of Appeal was confronted again with s. 7(1) of the Act. In coming to its decision the Court of Appeal made reference to *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* (*supra*) but did not follow or make any attempt to distinguish it.

[93] In dealing with the power of the first respondent under the said provision the Court of Appeal said this at pp. 296-297:

> It is our considered view that the legal issue here is not as simplistic as proposed by the appellant. It is not a clear case of objective test or subjective test. It is a fusion of both! It depends on the wordings of the enabling law that conferred such powers to the Minister.
>
> ...
>
> The wordings in Section 7(1): "if the Minister is satisfied" and "he may in his absolute discretion by order" are clear manifestations of the power being vested personally in the Minister and corollary to that vesting, any exercise of such power is to the subjective satisfaction of the Minister. Here the test for such satisfaction is subjective. It is without doubt a subjective discretionary power of the Minister.

[94] Surely such divergence of views requires this court to clear the confusion as to the correct test applicable in the exercise of power by the first respondent under the Act. Is the test objective, subjective or a fusion of the two? No doubt in the two cases mentioned the Court of Appeal was dealing with s. 7(1) of the Act whereas in the present case the Court of Appeal was dealing with conditions attached to the publication permit. Notwithstanding, the common issue is to determine which test to apply in the exercise of power by the first respondent under the Act. Moreover in the present case the phrase 'subjectively objective' test was also used in considering the impugned decision. This is another point that requires the determination by this court.

[95] Hence, leave should be granted on proposed questions 1, 2, 3, 5, 9 and 10 of Part A.

[96] Had the Court of Appeal in this case followed the decision in *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* (*supra*) it would have considered whether

the first respondent had apprised himself 'of the precedent objective facts' before imposing the conditions in the said letter including the impugned decision.

[97] And taking into consideration the undisputed fact that the Herald had been in circulation for the past fourteen years before the imposition of the impugned decision and 'that there was no evidence shown of prejudice to public order during that period' and the use of the word "Allah" was not prohibited in other publications such as the Al-Kitab and the Sikh Holy Book, there is a serious issue in the exercise of his discretion by the first respondent. The threat or fear of public disorder must not be fanciful or too remote. Should the test of public order be on the basis of a 'clear and present danger'? (See: *Schenck v. United States* [1919] 249 US 47; *Whitney v. California* [1927] 274 US 357). Or to adopt the view of the Court of Appeal in this case. The proposed questions 6, 7 and 8 of Part A cover this issue and leave should therefore be granted as well.

[98] There is also the issue of what is the current trend of approach when it comes to national security and public order. Public order and national security are not synonymous. Yet in this case the Court of Appeal appeared to have used the two terms interchangeably. There is therefore a need by this court to determine whether to distinguish them or to link them together. Further, learned SFC submitted that it is still the subjective test as decided in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* (*supra*). But learned counsel for the applicant argued that the approach has changed as indicated in the subsequent decisions of this court in cases such as *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* (*supra*); *Chng Suan Tze v. The Minister of Home Affairs* (*supra*); *John Peter Berthelsen v. Director-General of Immigration, Malaysia & Ors* (*supra*). Surely this is an opportunity for this court to determine once and for all the direction of the law that deals with exercise of discretionary power by the executive. Is this court to push the horizons of law forward or to restrict or retrogress them?

[99] Incidentally, it is interesting to note that the earlier cases such as *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* (*supra*) were considering the Internal Security Act 1960 (now repealed) while in this case it is the Act.

It has been said that when dealing with a different statute special attention must be directed to the provisions of that statute. (See: *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Liau Nyun Fui* [1991] 1 CLJ 458; [1991] 1 CLJ (Rep) 458). Further, decisions under a different statute are not generally precedents for the construction of another statute. (See: *London and North Eastern Railway Company v. Berriman* (1946) 1 AC 278). To assert therefore that the decisions in those security cases must be followed when dealing with issues under the Act is indeed contentious.

[100] There is also the issue of whether the Court of Appeal should have considered that 'where fundamental rights are allegedly violated by ministerial or executive orders the courts are obliged to engage in 'a closer or heightened scrutiny' of the reasonableness of the decision' on *Wednesbury* grounds. Indeed it is a legal principle that 'statutes which encroach on the rights of a subject whether as regards person or property are subject to a strict construction in the same way as penal statutes. It is also settled rule that such statutes should be construed, if possible, so as to respect such rights'. (See: *Walsh v. Secretary of State for India* [1863] 11 ER 1068; *Hough v. Windus* [1883-1884] 12 QBD 224).

[101] There was much reliance by the learned SFC on the case of *Council of Civil Service Unions & Ors v. Minister of Civil Service* (*supra*) when submitting that on matter of national security the executive has the final say.

[102] With respect, while the case referred to, gave the Minister considerable leeway in matters of national security, there was no abdication by the courts and no assertion that matters of security were totally non-justiciable. In fact there was a clear assertion that although the Minister was the better judge of security considerations, that did not exclude the power of the courts to determine whether security was indeed involved. The Minister's exercise of power was not entirely subjective. The Minister must offer evidence to convince the courts that security considerations were indeed in play. Hence, the test for the exercise of power must be objective and not subjective.

[103] In fact it should be noted that the 'common law of judicial review in England and Wales has not stood still in recent years. Starting from the received checklist of justiciable errors set out by

Lord Diplock in the *CCSU*'s case [1985] AC 374, the courts (as Lord Diplock himself anticipated they would) have developed an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity. They continue to abstain from merits review – in effect, retaking the decision on the facts – but in appropriate classes of case they will today look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them. Beyond this, courts of judicial review have been competent since the decision in *Anisminic Ltd v. Compensation Commission* [1969] 2 AC 147 to correct any error of law whether or not it goes to jurisdiction ... (See: *Q & Ors, R (On the Application of) v. Secretary of State for the Home Department* [2003] EWCA Civ 364 at para. 112).

[104] And in this connection it may be timely to recall the advice of Raja Azlan Shah J (as His Majesty then was) when he said that the 'winds of change must be heeded in the corridors of the courts if we in the law are to keep abreast of the times'. (See: *Chandrasekaran & Ors v. Public Prosecutor* [1970] 1 LNS 11; [1971] 1 MLJ 153).

[105] As such there is therefore a need for this court to clarify which direction our administrative law should take and in the process to determine the decision of the Court of Appeal in this case. Leave should therefore be given. The proposed questions 2, 3, 4 and 5 of Part A cover this point.

Part B Proposed Questions

[106] There is a dispute whether the proposed questions in Part B are necessary. The learned SFC seemed to think that their determination would not reverse the decision of the Court of Appeal since it was dealing with judicial review action. Learned counsel for the applicant submitted otherwise. It was also highlighted that the learned judges of the Court of Appeal dealt with the issues covered by those proposed questions.

[107] With respect, having read the judgments of the learned judges of the Court of Appeal, it is quite clear that in upholding the impugned decision they also relied on their interpretations of the relevant articles in the FC.

[108] As submitted by learned counsel for the applicant the interpretations by the learned judges of the Court of Appeal to some of the key articles in the FC have the following consequences or implications, namely:

(i) That art. 3(1) takes precedence over the other articles including those dealing with fundamental rights and liberties since it comes before the others;

(ii) That in interpreting art. 3(1) the significance of arts. 3(4), 11(1) and 11(4) have been derogated or overlooked. The effect of the interpretation by the Court of Appeal is that other religions may be practiced in peace so long as it is in harmony with Islamic precepts and doctrines;

(iii) That the interpretation of art. 3(1) is contrary to the documentary evidence on the formation of the Federation being a secular State. The case of *Che Omar Che Soh v. PP* [1988] 2 MLJ 55 was cited in support.

(iv) That the Court of Appeal made the essential and integral part of the religion test exclusive without due consideration to the other provisions in art. 11 which allow other religions to profess, practice and manage their own affairs. Reference was also made to the case of *Meor Atiqulrahman Ishak & Ors v. Fatimah Sihi & Ors* [2006] 4 CLJ 1; [2006] 4 MLJ 605; and

(v) That the impugned decision as upheld by the Court of Appeal has curtailed the rights of the Bahasa Malaysia speaking Christians from Sabah and Sarawak thus contrary to art. 11(1) and (3) of the FC.

[109] There are merits in the foregoing submissions by learned counsel for the applicant. This case only involved the Bahasa Malaysia section of the Herald. Yet the decision of the Court of Appeal seems to sanction a sweeping, general prohibition against the use of the word "Allah" by all non-Muslims in all forms on all occasions. Most of the groups affected such as the Sikh community were not parties in this case.

[110] Further, on the test of essential and integral part of religion, there is no reason why the rights under art. 11 of FC should be confined to those that are essential and integral or at the core of the religion. On matters of freedom of religion the protection should be all encompassing and not restricted or compartmentalised.

[111] Hence, unless further determined by this court the interpretations of the relevant articles in the supreme law of the Federation by the Court of Appeal have to be accepted as correct, the law and binding upon the courts below and upon the citizenry of the Federation.

[112] It is disquieting in this case to note that in determining the ranking of importance of the various articles in the FC the Court of Appeal seems to have adopted the 'first-come basis' approach. It can lead to an interpretation that the judiciary ranks inferior to the legislature and the executive as in the FC it comes after the two branches. Surely the drafters and the founding Fathers of the Federation would not have anticipated such an approach. Further, the basic structure of the FC is sacrosanct. The various documents, being the initial foundation in the formation of the Federation, must not be cast aside as mere historical artifacts. (See: *Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato Ting Check Sii* [2009] 4 CLJ 449; [2009] 4 MLJ 165 FC).

[113] As such it is only appropriate that leave should be granted on those proposed questions so that this court has the opportunity to consider whether the relevant articles in the FC have been correctly interpreted and thus justified the upholding of the impugned decision.

[114] Leave to appeal on the proposed questions in Part B should therefore be allowed as they have met the requirement of s. 96(b) of the Act.

Part C Proposed Questions

[115] In opposing leave on the proposed questions in Part C learned SFC submitted as well that their determination would not reverse the decision of the Court of Appeal and thus not within s. 96 of CJA.

[116] Learned counsel for the applicant submitted that the proposed questions in Part C come within s. 96(a). They involve novel points and further argument on them is important and of public advantage. They deal with the appropriateness of the learned judges of the Court of Appeal in conducting their own research *via* the internet and relying on the information and points obtained therefrom to substantiate their judgments. The parties

were not given any prior opportunity to submit on those materials obtained. The case of *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430; [2009] 6 MLJ 293 was cited in support of the argument.

[117] There is merit in the submission of learned counsel for the applicant. Firstly, accepting the submission of learned SFC would set a precedent binding on the lower courts yet untested before this court. Secondly, the Court of Appeal relied upon the materials gathered *suo moto* from the internet in upholding the impugned decision. As such the determination of the proposed questions in Part C would have a bearing on the fate of decision of the Court of Appeal.

[118] Accordingly, leave should be granted on those proposed questions in Part C.

Conclusion

[119] For the above reasons the applicant has satisfied the requirements of s. 96(a) and (b) of CJA. It deserves to be re-emphasised that in addition to those requirements one factor must also be given serious consideration, namely, the degree of public importance of those legal issues raised by the applicant and on the necessity of them to be finally resolved by the Federal court. Accordingly, leave to appeal should be granted on all the proposed questions in Part A, B and C as prayed for in encl. 2(a). Some of them might overlap but such technical matter should be addressed at the outset of the hearing proper of the appeal. Order in terms to the other orders sought for in encl. 2(a) is also granted. There should be no order as to costs.

Zainun Ali FCJ (dissenting):

Introduction

[120] I shall begin by saying that it is customary that reasons are seldom, if ever, provided in the grant or dismissal of leave applications, save for matters of great import, or where it is crucial that guidance be given to stakeholders.

[121] It is arguable though, that there is value in transparency and accountability, both for the integrity of the justice system generally and for the parties to know why the apex court has declined or allowed their application for leave, as the case may be.

[122] However on the flipside, it has been said that it is better to avoid comments on the matter when the merits of the case have not been heard, to avoid further confusion. In fact the latter is in line with international practice (See *Webb v. UK* [1997] 24 EHRR CD 73 such that it lends support to the saying that silence is golden.

[123] However, for the purposes of this leave application, the issues are too weighty to suffer indifference. Thus in this case transparency would still be the best policy.

[124] As a start, although much of the factual background and legal dimension of this application had already been well documented, some relevant points will nevertheless be given, as to provide an unsparing account of the issues at hand.

[125] The issues are important, for they stand in the teeth of a full blown exercise of power. Thus the desire to get a correct answer takes on greater urgency.

[126] This application arose when the applicants, aggrieved with the first respondent's (hereinafter referred to as the Minister) letter of 7 January 2009 (the Minister's letter), filed an application for judicial review of the said order to the High Court pursuant to O. 53 r. 3(1) of the Rules of the High Court 1980 (RHC). The relief sought for were, *inter alia*, an order of *certiorari*, declaration, for stay of the decision, costs and other reliefs. The High Court on 24 April 2009 granted leave to which to the Attorney General's Chambers did not object.

[127] The Minister's letter, whilst approving the permit to publish the applicant's Catholic weekly 'The Herald', imposed two conditions thereon. The first condition was that the applicant was prohibited from using the word "Allah" in the Bahasa Malaysia version of the Herald until such time the court makes a decision on the matter. The second condition is that the publication is restricted only to the church and to those who profess the Christian faith.

[128] It is undisputed that whilst the applicant did not resist the second condition, they did the first. Thus this application for judicial review of the Minister's order.

[129] It was the first condition above ('the impugned decision') which was the basis of applicant's application for judicial review.

[130] It is convenient to briefly state the grounds in support of the applicant's application which are as follows:

... The Respondents in making the decision dated 7.1.2009:

(i) acted in breach of the rules of natural justice, procedural and substantive fairness and the duty to act fairly;

(ii) asked the wrong questions in the decision making process;

(iii) took into account irrelevant considerations;

(iv) omitted to take into account relevant considerations;

(v) acted in violation of the Applicant's legal rights in line with the spirit, letter and intent of Articles 3, 10, 11 and 12 of the Federal Constitution;

(vi) were irrational and unreasonable within the ambit of the principles laid down in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* (1948) 1 KB 223;

(vii) acted irrationally and unreasonably by prohibiting the Applicant from using the word "Allah" or directly quoting the word "Allah" from the Al-Kitab;

(viii) acted illegally, misconstrued and misapplied the relevant provisions of the Printing Presses and Publication Act 1984;

(ix) acted *ultra vires* the printing Presses and Publications Act 1984;

(x) imposed conditions on the applicant which are oppressive and onerous; and

(xi) acted *mala fide*.

[131] The third to ninth respondents filed their applications under O. 53 r. 8 of the RHC to be heard in opposition.

[132] Basically, the issue before the court relates to the exercise of power by the Minister (the first respondent), prohibiting the applicant from using the word "Allah" in the Bahasa Malaysia section of the Herald.

[133] The High Court granted the relief sought for by the applicant after hearing their judicial review application.

The High Court Judgment

[134] If it can be summarised, the High Court held that:

(a) Judicial review to correct errors of law committed in exercising any discretion pursuant to the Printing Presses and Publications (Licenses and Permits) Rules 1984 (the 1984 Rules) is not ousted by s. 13A of the Printing Presses and Publication Act 1984 ('the Act');

(b) in the exercise of his discretion to impose further conditions in the publication permit, the Minister (first respondent) took into account irrelevant matters instead of relevant matters. That, based on the uncontroverted historical evidence averted by the applicant, the Minister had no factual basis to impose the additional conditions in the permit;

(c) the Minister's conditions as imposed were illegal, null and void due to the following:

(i) although art. 3(1) of the Federal Constitution (FC) provides that Islam is the official religion of the Federation of Malaysia, other religions may be practised in peace and harmony in any part of the Federation;

(ii) the use of the word "Allah" being in practice of the Christian religion must be considered;

(iii) the word "Allah", based on evidence, is an essential part of the instruction and worship in the faith, of the Malay speaking community of the Catholic Church and is integral to the practice and propagation of their faith;

(d) that the prohibition of the use of the word "Allah" in the Herald is unconstitutional since:

(i) it contravenes the provisions of arts. 3(1), 11(1) and 11(3) of the FC;

(ii) it is an unreasonable restriction on the freedom of speech and expression under art. 10(1)(c) of the FC;

(iii) it is an unreasonable administrative act which offends the first limb of art. 8(1) of the FC;

A (e) that the respondent's action was illogical and irrational. It is also inconsistent since the word "Allah" had been in use and permitted for worship in the Bahasa Malaysia edition of the Bible. Furthermore the reasons given by the first respondent in the various directives were unreasonable;

B (f) that s. 9 of the various State Enactments which made it an offence to use courts words and expression could be construed in this manner:

C (i) reading it in conjunction with art. 11(4) of the FC; and

(ii) by applying the doctrine of proportionally that is to test whether the legislative state action, which includes executive and administrative acts of the State, was disproportionate to the object it sought to achieve.

D (g) that the respondents did not have materials to substantiate their contention that the use of the word "Allah" by the Herald could cause a threat to national security;

E (h) that "the court has to determine whether the impugned decision was in fact based on the ground of national security"; and

(i) that the subject matter referred to in the proceedings was justiciable contrary to the objections raised by the respondents.

F **The Court Of Appeal**

[135] The learned judges of the Court of Appeal unanimously reversed the judgment of the High Court; in so doing, they handed down their respective judgments which will be referred to when necessary in this judgment.

G

[136] It is the applicant's contention that the judgments of the two different tiers of the High Court and Court of Appeal have revealed acute differences in their legal approach as regards the extent of the Minister's power and the question of public order; that it also showed differences in their approach with regard to the legal principles applicable to the exercise of discretion by the Minister and the constitutional safeguards of the freedom of expression and religion.

H

I

The Applicant's Proposed Leave Questions

[137] The applicant in encl. 2(a) sought leave, based on a set of proposed questions in three parts under the triple headings of PART A - ADMINISTRATIVE LAW QUESTIONS, PART B – CONSTITUTIONAL LAW QUESTIONS and PART C – GENERAL QUESTIONS. They are as follows:

Part A: The Administrative Law Questions

(1) Where the decision of a Minister is challenged on grounds of illegality or irrationality and/or *Wednesbury* unreasonableness, whether it would be incumbent on the Minister to place before the court the facts and the grounds on which he had acted?

(2) Whether the decision of a Minister is reviewable where such decision is based on ground of alleged national security and whether it is a subjective discretion? Is the mere assertion by the Minister of a threat to public order, or the likelihood of it, sufficient to preclude inquiry by the court?

(3) Whether in judicial review proceedings a court is precluded from enquiring into the grounds upon which a public decision maker based his decision?

(4) Where the decision of the Minister affects or concerns fundamental rights, whether the court is obliged to engage in a heightened or close scrutiny of the *vires* and reasonableness of the decision?

(5) Whether the characterization of the Minister's discretion as an absolute discretion precludes judicial review of the decision?

(6) Whether the decision by the Minister to prohibit the use of the word "Allah" is inherently illogical and irrational in circumstances where the ban is restricted to a single publication of the restricted group while its other publications may legitimately carry the word?

(7) Whether the use of a religious publication by a religious group within its private place of worship and for instruction amongst its members can rationally come within the ambit of a ministerial order relating to public order or national security?

A (8) Can the Executive/State which has permitted the use of the word "Allah" in the Al Kitab prohibit its use in the Bahasa Malaysia section of the Herald – a weekly newspaper of the Catholic Church ('the Herald'), and whether the decision is inherently irrational?

B (9) Whether it is legitimate or reasonable to conclude that the use of the word "Allah" in the Herald which carries a restriction 'for Christians only' and 'for circulation in church' can cause confusion amongst those in the Muslim community?

C (10) Whether the claims of confusion of certain persons of a religious group could itself constitute threat to public order and national security?

Part B: The Constitutional Law Questions

D (1) Whether Article 3(1) of the Federal Constitution is merely declaratory and could not by itself impose any qualitative restriction upon the fundamental liberties guaranteed by Articles 10, 11(1), 11(3) and 12 of the Federal Constitution?

E (2) Whether in the constitution of Article 3(1) it is obligatory for the Court to take into account the historical constitutional preparatory documents, namely, the Reid Commission Report 1957, the White Paper 1957, and the Cobbold Commission Report 1962 (North Borneo and Sarawak) that the declaration in Article 3(1) is not to affect freedom of religion and the position of Malaya or Malaysia as a secular state?

F (3) Whether it is appropriate to read Article 3(1) to the exclusion of Article 3(4) which carries the guarantee of non-derogation from the other provisions of the Constitution?

G (4) Whether it is a permissible reading of a written constitution to give precedence or priority to the articles of the constitution in the order in which they appear so that the Articles of the Federal Constitution that appear in Part I are now deemed to rank higher in importance to the Articles in Part II and so forth?

H (5) Whether on a true reading of Article 3(1) the words 'other religious may be practised in peace and harmony' functions as a guarantee to the non-Muslim religions and as a protection of their rights?

I (6) Whether on a proper construction of the Federal Constitution, and a reading of the preparatory documents, namely, the Reid Commission Report (1957), the White paper (1957) and

the Cobbold Commission Report (1962), it could legitimately be said that Article 3(1) takes precedence over the fundamental liberties provisions of Part II, namely, Articles 8, 10, 11(1), 11(3) and 12 of the Federal Constitution? A

(7) Whether the right of a religious group to manage its own affairs in Article 11(3) necessarily includes the right to decide on the choice of words to use in its liturgy, religious books and publications, and whether it is a legitimate basis to restrict this freedom on the ground that it may cause confusion in the minds of members of a another religious group? B C

(8) Whether the avoidance of confusion of a particular religious group amounts to a public order issue to deny another religious group its constitutional rights under Articles 8, 10, 11(1), 11(3) and 12 of the Federal Constitution?

(9) Whether it is reasonable or legitimate to conclude that the use of the word "Allah" for generations in the Al-Kitab (the Bahasa Malaysia/Indonesia translation of the Bible) and in the liturgy and worship services of the Malay speaking members of the Christian community in Malaysia, is not an integral or essential part of the practice of the faith by the community? D E

(10) Whether the appropriate test to determine if the practice of a religious community should be prohibited is whether there are justifiable reasons for the state to intervene and not the 'essential and integral part of the religion' test currently applied under Article 11(3)? F

(11) Whether the standards of reasonableness and proportionality which have to be satisfied by any restriction on freedom of speech in Article 10 and Article 8 is met by the present arbitrary restriction on the use of the word "Allah" imposed by the Minister of Home Affairs? G

(12) Whether it is an infringement of Article 10 and 11 of the Federal Constitution by the Minister of Home Affairs to invoke his executive powers to prohibit the use of a word by one religious community merely on the unhappiness and threatened actions of another religious community? H

(13) Whether the Latin maxim '*salus populi est suprema lex*' (the welfare of the people is the supreme law) can be invoked without regard to the terms of the Federal Constitution and the checks and balances found therein? I

A Part C: General

(1) Whether it is appropriate for a court of law whose judicial function is the determination of legal-cum-juristic questions to embark *suo moto* on a determination of theological questions and of the tenets of comparative religions, and make
B pronouncements thereto?

(2) Whether it is legitimate for the Court of Appeal to use the platform of 'taking judicial notice' to enter into the non-legal thicket of theological questions or the tenets of comparative
C religions?

(3) Whether the Court is entitled *suo moto* to embark upon a search for supportive or evidential material which does not form part of the appeal record to arrive at its decision?

D (4) Whether the Court can rely in information gathered from internet research without first having determined the authoritative value of the source of that information or rely on internet research as evidence to determine what constitute the essential and integral part of the faith and practice of the Christians?

E (5) Whether the use of research independently carried out by a Judge and used as material on which the judgment was based without it first been offered for comment to the parties to the proceedings in breach of the principle of natural justice?

F **[138]** As is common knowledge, to succeed in an application for leave, the applicant bears the burden of satisfying the court that the questions posed have crossed the threshold in s. 96 of the Courts of Judicature Act 1964 ('CJA'). It is instructive to set out
G the relevant provisions of s. 96 CJA, which read as follows:

96. Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:

H (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument
I and a decision of the Federal Court would be to public advantage; or

(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[139] *Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25 is the *locus classicus* on s. 96 of the CJA, having put paid to the inconsistencies found in *Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors* [1999] 1 CLJ 325; [1999] 1 MLJ 257 and *Joceline Tan Poh Choo & Ors v. V Muthusamy* [2009] 1 CLJ 650; [2008] 6 MLJ 621.

[140] Thus, the scope of the applicant's leave question covers both limbs of s. 96(a) as well as s. 96(b).

[141] It is instructive to also consider the basic prerequisites which an applicant needs to satisfy, before leave could be granted under s. 96 of the CJA.

[142] First, under s. 96(a) of the CJA, the prerequisites are:

(i) That leave to appeal must be against the decision of the Court of Appeal;

(ii) That the cause or matter must have been decided by the High Court exercising its original jurisdiction;

(iii) That the question must involve a question of law which is of general principle not previously decided by the court in that it must be an issue of law of general principle to be decided for the first time (the first limb of s. 96(a) of the CJA); or

(iv) Alternatively, it is a question of importance upon which further argument and decision of this court would be to public advantage (the second limb of s. 96(a)).

[143] The two limbs of s. 96(a) are to be read disjunctively. As regards s. 96(b), these relate to constitutional law questions.

[144] Conversely, leave will normally not be given:

(i) Where it merely involves interpretation of an agreement unless the Federal Court is satisfied that it is for the benefit of the trade or industry concerned;

A (ii) The answer to the question is abstract, academic or hypothetical; and

(iii) Either or both parties are not interested in the result of the appeal.

B **[145]** Looking at the proposed leave questions, it is apparent that they are grounded on the legal issues that have arisen from the Minister of Home Affair's ('the Minister') decision in the exercise of his power under the Printing Presses and Publication Act 1984 ('the Act') which imposed a ban on the use of the word "Allah" C in the Bahasa Malaysia edition of the Catholic weekly, the Herald on the ground of public order.

[146] Thus, the pith of this leave application is:

D That in imposing the condition he did, the question is whether the Minister's declaration that he acted on public order or national security grounds precludes review, or whether the court has to be satisfied as to the reasonableness of this concern and of the materials on which he acted.

E **[147]** The determining factors of the "reasonableness" of the Minister's decision is a constant refrain in this case. This of course leads to the question of proportionality and whether the balance between competing interests was considered at all by the Minister.

F **[148]** In reversing the High Court judgment, the Court of Appeal had applied a test which was termed as being "subjectively objective". This contradiction in terms will be discussed latterly.

[149] The Court of Appeal also made a finding that the word G "Allah" is not an integral part of the faith and practice of Christianity.

[150] More importantly, it is the applicant's contention that there is considerable ambiguity today on the scope of the Court of Appeal's judgment. It was alleged by the applicants that although H the Minister's order was directed as a prohibition against the use of the word "Allah" only in the Bahasa Malaysia edition in the Herald, the terms of the Court of Appeal judgments and reasoning applied by the court seemed to have sanctioned a general I prohibition against the use of the "Allah" word by members of the Christian community in Malaysia for their religious programmes. This belief is sparked by the holding of all three judgments, but

largely adopting the reasoning of Mohd Zawawi Salleh JCA, that the use of the word "Allah" is not an essential and integral part of the Christian faith and would not therefore enjoy the protection of art. 11(1) and (3) of the Federal Constitution. A

[151] Is this the effect of the judgment and if so, what would be its implications? B

A scrutiny of the Court of Appeal judgment is thus incumbent, as it has wide ramifications, if true. All the questions posed in PART A, when taken together can be condensed into one issue, that is what is the extent of the Minister's discretionary power and in its determination, what is the test to be applied; is it subjective or objective or a fusion of both as the Court of Appeal seemed to suggest? C

[152] As an adjunct to the above, it would be relevant to also ask: D

(i) Which of the tests was actually applied in this case?; and

(ii) Why is it critical to determine which of the tests was applied? E

[153] Again, it is imperative that these questions need to be articulated, since applying the wrong test would lead to far-reaching consequences in the sphere of judicial review.

[154] However before getting to the pith of the issue, there are peripheral ones which are equally important. The first of these is the source of power issue. F

The Source Of The Minister's Power

[155] What was the source of power under which the Minister imposed the conditions as stipulated in his 7 January 2009 letter including the impugned decision? G

[156] There seems to be some uncertainty in this regard. The Minister himself was reticent as to its source, whilst the Court of Appeal Judges were divergent. H

[157] The lead judgment of Mr Justice Apandi Ali JCA (as His Lordship then was), relied on s. 26 of the Act, or the implied powers under s. 40 of the Interpretation Acts 1948 and 1967 as being the source of the Minister's power. I

[158] Mr Justice Abdul Aziz Rahim JCA however held that the power was to be found in s. 12 of the Act, together with the Form B conditions.

[159] Given the uncertainty as to the source of power, in what is essentially a crucial decision made by the Minister to impose a prohibition on the use of a word by a religious body, it is important that the source of power be clarified and settled in clear terms by this court, for otherwise the Minister's exercise of power and the Court of Appeal's decision which affirmed it would be seriously challenged.

Judicial Review Of Process Only?

[160] The Court of Appeal's judgment which declared that judicial review is only concerned with the decision-making process and not the decision itself, is with respect, old hat.

[161] The Malaysian courts have long moved on since the pre-Rama Chandran (*R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147) days, when judicial review then permitted review only as regards the process and not the substance. Today, the concept of judicial review permits review of process and substance in determining the reasonableness of a decision by a public authority. (See *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 and *Datuk Justine Jinggut v. Pendaftar Pertubuhan* [2012] 1 CLJ 825).

[162] The divergent approaches made by the Court of Appeal on this issue ought to be addressed too, by this court.

[163] Leave should also be granted for the reason that the decision of the Court of Appeal in this case is at variance with the earlier decision of that court, dealing with the same provision of the Act, ie, the case of *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* [2012] 9 CLJ 297 (the *'Sisters in Islam'* case).

[164] *Sisters in Islam* also involved a decision taken under the Printing Presses And Publications Act 1984, on alleged public order grounds. The Court of Appeal quashed the Minister's "absolute" discretion to ban the book in question and held that the book could not be prejudicial to public order as it had been in circulation for two years before the order to ban it.

[165] It was said that the decision to ban the book was "such outrageous defiance of logic that it falls squarely within the meaning of *Wednesbury* reasonableness and of irrationality". A

[166] Based on the above, the Court of Appeal in *Sisters in Islam* had clearly applied the objective test in determining the exercise of Ministerial discretion as opposed to the 'subjectively objective' test cast upon the Minister's exercise of power in this case. B

[167] What then is the test to be applied in determining the exercise of the Minister's discretionary power in cases involving national security or activities which would be prejudicial to public order? C

The Subjective Test

[168] A good starting point would be to look at *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129 ('*Karam Singh*'), where the subjective test was applied. For a good many years, this test found favour in our judicial system. *Karam Singh* had applied the case of *Liversidge v. Anderson* [1942] AC 206 and its companion case of *Greene v. Secretary of State for Home Affairs* [1942] AC 284 (even if the House of Lords preferred the strong dissenting judgment of Lord Atkin). D E

[169] In the *Karam Singh* 'stable' of cases, the policy is that administrative decisions which are based on policy considerations and national security are not usually amenable to review by the courts, since it depends on the subjective satisfaction of the Minister. F

[170] This is apparent in *Liversidge v. Anderson (supra)* and *Greene (supra)*, which concerned the discretion of the Secretary of State under reg. 18B of the Defence (General) Regulations 1939, to make a detention order against any person whom the Secretary of State has 'reasonable cause to believe' to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm. G H

[171] The House of Lords adopted the subjective approach and held in both cases that the discretion under reg. 18B is a matter for the executive discretion of the Secretary of State, and that where the Secretary of State acting in good faith makes an order I

A in which he recites that he has reasonable cause for his belief, a **court of law cannot inquire whether in fact the Secretary of State had reasonable grounds for his belief**. Lord Atkin dissented, in preference for the **objective approach** and held that the Home Secretary had not been given an unconditional
B authority to detain. (emphasis added)

[172] On the local scene, *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129, contemplated the subjective satisfaction of
C the Minister and found that his 'satisfaction' in granting the order was not justiciable. Several cases such as *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81 followed the principle in *Karam Singh*. It found favour in other cases such as *Yeap Hock Seng v. Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ
D 279. *Athappen Arumugam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1983] 1 LNS 182; [1984] 1 MLJ 67, *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 LNS 132; [1988] 1 MLJ 293 and the Singapore case of *Lee Mau Seng v. Minister for Home Affairs* [1971-1973] SLR 135.

E **[173]** It was clear in these cases that what was 'national security' was left very much in the hands of those responsible for it. In other words, the subjective determination of the Minister/executive is non-justiciable.

F **[174]** However over the years, the willingness of courts to impose limits upon the Minister's discretion is seen in the early cases like *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997, which matches the way in which they have frequently cut down the width of the discretion of local authorities.

G **[175]** This is especially apparent when state action (whether legislative or executive) infringes upon a right (especially fundamental rights), where it could be cut down to size, unless it shows three factors, ie, that:

H (i) it has an objective that is sufficiently important to justify limiting the right in question;

(ii) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and

I

(iii) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve (per Lord Steyn in *R v. Secretary of State for the Home Department Ex Parte Daly* [2001] UKHL 26).

[176] In other words, a decision may be set aside for unreasonableness. The difficulty of course, is to know when a decision may be said to be unreasonable.

[177] The celebrated case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 needs no introduction. Lord Greene MR clearly set out what is termed as the *Wednesbury* test – namely that a court may set aside a decision for unreasonableness only when the authority has come to a conclusion "so unreasonable that no reasonable authority could ever have come to it".

[178] The judgment emphasised that the concept (of unreasonableness) is closely related to other grounds of review, such as irrelevant considerations, improper purposes and error of law.

[179] In that connection, Lord Denning MR in *Pearlman v. Keepers and Governors of Harrow School* [1979] QB 56 said that the new rule should be that "no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends".

[180] In supporting this view, Lord Diplock said that:

> … the breakthrough made by *Anisminic* (*Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147) was that, as respect administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes, abolished. (*R v. Monopolis and Merger Commission ex p South Yorkshire Transport Ltd* [1993] 1 All ER 289).

[181] Over the years, the issue of judicial review has become a hard-edged question.

[182] This is because the reliance on error of law as a ground for controlling discretion, places the courts in a position of strength, *vis-à-vis* the administration, since it is peculiarly for the courts to identify errors of law. As case laws have shown, error

of law is a sufficiently flexible concept to enable the judges, if they feel it incumbent, to make a very close scrutiny of the reasons for a decision and the facts on which it was based.

[183] This was manifested in no uncertain terms by Raja Azlan Shah CJ (as His Royal Highness then was) in the leading case on the subject – *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 ("*Sri Lempah*").

[184] His Lordship explained the principle very clearly when he said that:

> ... On principle and authority the discretionary power to impose such conditions 'as they think fit' is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene MR in the *Wednesbury* case, have regard to all relevant considerations and disregard all improper consideration, and they must produce a result which does not offend against common sense ...

[185] Thus when a person such as a Minister, is entrusted with a power of discretion, he is under an obligation to exercise it reasonably and in accordance with the terms of the relevant provision of the statute that confers him the power or discretion. This principle is applied with vigour even when the language of the statutory power is couched in wide terms.

[186] Possibly, the turning point came about when the Federal Court decided in *Merdeka University Berhad v. Government of Malaysia* [1982] 1 LNS 1; [1982] 2 MLJ 243 ('the *Merdeka University*' case), that "it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister appraised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order."

In other words, this was the beginning of the application of the "objective" test.

[187] It is clear that courts from then on were prepared to ascertain whether the satisfaction of the Minister has been properly exercised in law.

[188] It is appropriate at this stage to cite the antiquated case of *Ex Parte Sim Soo Koon* [1915] SSLR 57 as a reminder of what "discretion" means. Earnshaw J, referred to *Sharp v. Wakefield* [1891] AC 173, which held that "discretion means, when it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself."

[189] This salutary principle appeared to be resurrected in the cases after *Merdeka University* (*supra*).

[190] If the oft-quoted reminder of Raja Azlan Shah FCJ in *Sri Lempah (supra)* can be rephrased, it is a truism that "every legal power has legal limits, for otherwise there is dictatorship".

[191] Thus, authorities such as *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309; [2002] 4 MLJ 449, *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333, and in recent times *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300, *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* [2012] 9 CLJ 297; [2012] 6 AMR (*'Sisters'* case), *Mkini Dotcom Sdn Bhd v. Ketua Setiausaha Dalam Negeri & Ors* [2013] 6 AMR 668 and *Dato' Ambiga Sreenevasan & Ors v. Menteri Dalam Negeri & Ors* [2012] 7 CLJ 43, all applied the objective test.

[192] Meanwhile across the causeway, the leading case in Singapore which applied the objective case is that of *Chng Suan Tze v. The Minister of Home Affairs & Ors and Other Appeals* [1988] 1 LNS 162; [1998] SLR 525. This case is of particular significance because it relates to the interpretation of s. 8 of the Singapore Internal Security Act, where the Minister's power (like our erstwhile ISA) was couched in subjective terms. Yet the Singapore Court of Appeal found that:

> ... it is the objective test that is applicable to the review of the exercise of discretion under ss. 8 and 10. In our judgment, the time has come for us to recognise that the subjective test, in respect of ss. 8 and 10 of the ISA can no longer be supported ...

[193] Alas, the euphoria was short-lived. On 26 and 28 January 1989, Singapore passed the Constitution of the Republic of Singapore (Amendment) Bill and the ISA (Amendment) Bill to restore the decision in *Lee Mau Seng v. Minister for Home Affairs, Singapore & Anor* [1971] 1 LNS 58; [1971] 2 MLJ 137, which applied the subjective test to s. 8 of the ISA.

[194] But apart from this constitutional and legislative amendment, the objective test remains good law in Singapore and the following decisions have continued to reaffirm the objective test. (See *Yong Vui Kong v. AG* [2011] SGCA 9; *Kamal Jit Singh v. Minister for Home Affairs* [1992] 3 SLR (R) 352; *Re Wong Sin Yee* [2007] 4 SLR (R) 676; *Jessie Tan Gek Neo v. The Minister for Finance & Anor* [1991] 1 CLJ 622; [1991] 4 CLJ (Rep) 877; [1991] SLR 325.

[195] It is time to examine our courts' approach in determining cases which are closely connected and relevant to this case. Two cases stood out. They are:

(i) *Darma Suria Risman Saleh v. Menteri Dalam Negeri (supra)*, and

(ii) *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum Malaysia (supra)* – (the '*Sisters in Islam'* case).

[196] Beginning with the case of *Darma Suria (supra)*, it is clear that there, the Federal Court settled for the objective test, even if s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 was couched in subjective terms. Section 4(1) began thus:

> If the Minister is satisfied …

[197] The Federal Court in *Darma Suria (supra)* referred to the decision in *Merdeka University (supra)*, which had a similar subjective element in its provision, where s. 6(1) of the Universities and University Colleges Act 1971 reads:

> … If the Yang di-Pertuan Agong is satisfied …

[198] In *Sisters in Islam*, the Court of Appeal considered s. 7(1) of the Printing Presses and Publications Act 1984 and examined the substance of the Minister's 'absolute discretion' banning the respondent's book entitled "*Muslim Women and the Challenges of Islamic Extremism*".

[199] Although there were no submissions made as to which test was applied, the Court of Appeal quashed the Minister's discretion to ban the book because the court found that the book could not be prejudicial to public order as it had been in circulation for two years before the order to ban it.

[200] It is worth repeating that the decision to ban the book was "such an outrageous defiance of logic that it falls squarely within the meaning of *Wednesbury* unreasonableness, and of irrationality". *Wednesbury* unreasonableness is "a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it". See *Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia & Anor* [2013] 2 CLJ 137; [2013] 2 AMR 238.

[201] The same words or its substance ie, "no sensible person who has applied his mind to the question to be decided could have arrived at it" are found in Suffian LP's judgment in *Merdeka University* (*supra*).

[202] From this analysis, it can safely be said that Malaysian courts have been applying the objective test when reviewing Ministerial or an inferior tribunal's decision even if they do not express it, since the language of *Wednesbury* unreasonableness is similar to what Suffian LP said in *Merdeka University*.

[203] Reverting to *Sisters in Islam*, it is arguable that the Court of Appeal there applied an objective test to quash the Minister's decision banning the book, because it looked at the facts objectively before concluding that no reasonable Minister would have banned the book.

[204] The last case which requires scrutiny is the case of *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors* [2013] 1 LNS 296; [2013] 4 AMR 289 ('*Arumugam*').

[205] In *Arumugam* (*supra*), the challenge was to the exercise of the Minister's power, under s. 7(1) of the Printing Presses and Publications Act 1984. Section 7(1) reads:

> … If the Minister is satisfied … he may in his absolute discretion by order …

[206] The Court of Appeal in *Arumugam* held that the decision of the Minister to ban the book was neither so outrageous that it defied logic or against any accepted moral standards "that the action taken was in the interest of national security, including public order for which the Minister bore responsibility and alone had access to sources of information and qualify it to decide to take the necessary action …".

[207] Further, the Court of Appeal in *Arumugam* had this to say:

> … It is our considered view that the legal issue here is not as simplistic as proposed by the appellant. It is not a clear case of objective test or subjective test. **It is a fusion of both**! (emphasis added)

[208] This pronouncement does not synchronise with its earlier one where the court found that the reference to s. 7(1) was to the Minister's 'satisfaction' and in 'his absolute discretion'. This was a clear signal that the Minister's power is to be exercised personally based on his subjective satisfaction. Therefore the Court of Appeal in *Arumugam* primarily applied the **subjective test** though the court seemed to suggest the existence of an element of objectivity. This hybrid is certainly unusual. (emphasis added)

[209] Against this backdrop, we return to the question at the beginning of this judgment ie, what was the actual test which was applied by the Court of Appeal in this case?

[210] In this case, a scrutiny of the lead judgment of the Court of Appeal was made. The learned judge stated that:

> (28) On the issue of the exercise of discretion in imposing the condition of prohibiting the usage of the word "Allah" by the respondent … I could not agree more than what was decided by this court in *Arumugam a/l Kalimuthu v. Menteri Keselamatan Dalam Negeri & 2 Ors* [2013] 4 AMR 289; [2013] 5 MLJ 174.
>
> (29) … Without repeating the principles discussed and decided therein, it is pertinent to state the appraisal of the facts by the Minister in the appeal before us has been correctly done, namely by way of it being **subjectively objective**. * 375 This is in line with the rationale in the Federal Court decision in *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ. (emphasis added).

[211] Further down in the body of the judgment, His Lordship stated that:

> [45] In other words, there is no particular standard of proof to show that the decision was based on national security. *In such circumstances as the case at hand, since the Minister is in charge of internal security it is not for the court to probe for strong evidential proof of national security. It must be inferred that the Minister's decision, involving national security is rational* … (emphasis added)
>
> [47] Applying the law to the facts and circumstances of the case and bearing in mind the principles to be taken in dealing, with judicial review as laid down in the oft-quoted case of *CCSU v. Minister of the Civil Service* [1984] 3 All ER 935, it is my considered finding that the Minister had not acted in any manner or way that merit judicial interference on his impugned decisions."
>
> [49] … Although the test under the written law is **subjective**, there are sufficient evidence to show that such decision was derived by considering all facts and circumstances in an objective manner. (emphasis added).

[212] The above paragraph is a contradiction in terms – because if the Minister's 'subjective satisfaction' is taken, then the need to show sufficient evidence that the decision was derived at by considering all fact and circumstances in an objective manner, does not arise.

[213] Firstly a careful reading of the above excerpts of the judgment explicitly showed that the Court of Appeal in this case primarily applied the subjective test. His Lordship was in agreement with the decision in *Arumugam* (which although it used the subjective test had suggested a fusion of tests in its approach).

[214] However, the learned judge went on to say that the appraisal of the facts was done by way of it being 'subjectively objective' and that this is in line with the rationale in *Darma Suria*.

[215] The entire paragraph weighs heavily; this is because *Arumugam* clearly opted for the subjective/objective test, whereas *Darma Suria* applied the objective test in full force. How could it then be said by the Court of Appeal that in this case the reference to *Arumugam* is correct and that it is "in line with *Darma Suria*?".

[216] In other words, could both tests in *Arumugam* and *Darma Suria* be applied simultaneously? The conundrum is complete when the term 'subjectively objective' was cast on the test applicable.

[217] The term "subjectively objective" is paradoxical since they are two different concepts which negates one another.

[218] Has the Court of Appeal in this case gone on a frolic of its own in applying this hybrid test? If the claim is that the Court of Appeal had in actual fact applied the objective test in this case even though it had attached a 'subjectively objective' label to define it, I believe this will cause further confusion. A close reading of the judgment as a whole does not lend itself to an objective reasoning being applied. In fact the contrary seems to be the position. In other words, the form and substance of the judgment do not add up. It is clearly at odds with the ratio in *Darma Suria* and by the same token, the court's endorsement of *Arumugam* engenders uncertainty.

[219] Since the words in *Darma Suria* in s. 4(1) that is:

> … If the Minister is satisfied …

are similar to the words in s. 7(1) of the Printing Presses and Publications Act in *Arumugam*, the Court of Appeal in this case should have therefore followed *Darma Suria* and not embark on its own interpretation. With respect, the Court of Appeal in this case and in *Arumugam* should indicate why it departed from *Darma Suria*, given the similar statutory language and circumstances in the two cases.

[220] This confusion would be straightened out when parties are given the opportunity to submit if leave is granted.

[221] The next question is: What is the significance of determining the applicable test?

The answer is simply this. It is critical that this court can determine whether the Minister's exercise of discretionary power is open to scrutiny or is the court precluded from it.

[222] If the test applied is a subjective test and thus judicial review is denied, is this desirable when the Minister grounded his decision on reasons of public order?

[223] In so doing, did the Minister give reasons for the prohibition? A

According to the learned Senior Federal Counsel ("SFC") in such situations the Minister has the final say. In other words, he need not give his reasons. The SFC relied heavily on the case of *Council of Civil Service Unions & Ors v. Minister of Civil Service* [1985] 1 AC 374 ('the *CCSU* case') to support her contention. With respect, even if cases involving national security and public order are within the Minister's purview, the Minister's exercise of power is certainly not completely beyond the court's competence. It is incumbent for the Minister to give reasons or offer evidence that the exercise of his power is legal and reasonable. B C

[224] The mixed signals given by courts in England and Wales over the deference given to the executive on matters of national security thus restricting judicial interference, was put to rest somewhat, in the case of Lord Alton of *Liverpool v. Secretary of State for the Home Department* [2008] EWCA Civ 443. D

[225] At the Court of Appeal, the court did not accept the argument that deference should be given to the Secretary of State and instead, the appropriate course was to adopt an intense and detailed scrutiny. E

[226] In fact Lord Steyn in a judicial studies board lecture entitled "*Deference: A Tangled Story*" 2004, *inter alia*, said that: F

> … the courts may properly acknowledge their own institutional limitations. In doing so, however, they should guard against their own institutional limitations. In doing so, however, they should guard against a presumption that matters of public interest are outside their competence and be aware that they are now the ultimate arbitrators (although not ultimate guarantors) of the necessary qualities of a democracy in which the popular will is no longer always expected to prevail. G

[227] In fact Lord Steyn's views are shared by Lord Rodger in *A (FC) & Others v. Secretary of State for the Home Department* [2004] UKHL 56 where he observed that: H

> On a broader view too, scrutiny by the courts is appropriate. There is always a danger that, by its very nature, a concern for national security may bring forth measures that are not objectively I

A justified. Sometimes, of course, as with the Reichstag fire, national security can be used as a pretext for repressive measures that are really taken for other reasons. There is no question of that in this case: it is accepted that the measures were adopted in good faith.

B **[228]** Can the same approach be adopted in our courts? As had been alluded to above, the judicial trend has been shown by our courts in cases such as *Mohamad Ezam v. Ketua Polis Negara* (*supra*), *Darma Suria* (*supra*), *John Peter Berthelsen v. Director-General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160; [1987] 1 MLJ 134, that "no reliance can be placed
C on a mere *ipse dixit* of the first respondent (the DG) and in any event adequate evidence from responsible and authorities sources would be necessary". (per Abdoolcader SCJ)

D **[229]** In this case the applicant's grounds of challenge as narrated in para. 7 of this judgment, spoke mainly of violation of its constitutional and legal rights.

[230] The question is whether the Minister's declaration that he acted on public order or national security grounds, and the alleged
E lack or absence of material before the court affects the proper balance between competing interests which the Court of Appeal in this case has to maintain.

[231] In *Sisters in Islam*, a measured approach was taken by the court.
F

[232] The court in *Sisters in Islam* stated that although the Minister's discretion was described as being 'absolute', it must still stand the test of whether it has been properly exercised in law, since the question whether the decision has been taken on the
G ground of public order is a question of law.

[233] In *Sisters in Islam* and to some extent in this case, it appears that belated reasons were taken. The court in *Sisters in Islam*, held that on the facts and evidence before it, there was
H nothing to support the Minister's decision. The court went on to say that "to conclude that the impugned book creates a public order issue is something that cannot stand objective scrutiny. To that extent an error of law is established on the facts".

I

[234] Likewise, in this case, based on the facts and evidence, can it be said that the Minister had applied procedural and substantive fairness and acted with proportionality and exercised his discretion within the statutory purpose of the Act?

[235] In view of these compelling dynamics, a need arises for this court to clarify them in a proper forum such that the merits will have their time of day.

Has The Applicant Passed The Threshold Test For Leave

Part A Questions

[236] In my view, it has. It is clear that the issues which have come up for consideration are of public importance within the meaning of s. 96(a) of the CJA. In fact, they are palpably so.

[237] A decision on these issues where this court reviews the judgment of the Court of Appeal for their correctness on every aspect would surely be momentous and would be to great public advantage, given the fact that the issues in this application are fraught with critical questions of public importance.

[238] The Federal Court in restating the principles in *Datuk Syed Kechik (supra)*, speaking through Zaki Tun Azmi CJ (as His Lordship then was), in *Terengganu Forest (supra)*, explained the application of s. 96(a) as follows:

> To obtain leave it must be shown that it falls under either of the two limbs of s. 96(a) but they can also fall under both limbs … Under the 1st limb, that decision by the Court of Appeal must however have raised a question of law which is of general principle not previously decided by this court … Alternatively the applicant must show that the decision would be to public advantage.

[239] If leave is required in the second limb of s. 96(a), the novelty of the issue need not be shown because the limb requires further argument on the issue. So if further argument is required it cannot be a novelty issue. The applicant has to show that it is for public advantage.

[240] A question that is of public advantage will have a favourable consideration.

[241] Even if it is clear and obvious that leave is not to be given as a matter of course, in this case it should look at the conflicting and inconsistent decisions by the Court of Appeal, Federal Court and High Court on several issues as alluded to above:

(a) Thus it is my view that the questions of law are of importance and upon which further argument and a decision of the Federal Court would be to public advantage;

(b) The Federal Court would be able to give some clarity to the existing state of the law;

(c) The Federal Court will have the opportunity to restate the law. [82]-86]

[242] Interestingly *Datuk Syed Kechik (supra)* accepts that a well established principle may be brought to the Federal Court if such an appeal serves to clarify or refine the principle so as to make it apply to other situations in the future "... and on which authorities guidance of the Federal Court would be of great utility ...".

Part B

[243] I shall refrain from answering the questions raised in this PART as in my view, the questions in Part A themselves offer enough justification for leave being granted under s. 96(a) of the Courts of Judicature Act 1984. In any case some of the questions here do overlap and they can then be taken at the appeal stage.

Part C

[244] Another pertinent issue which warrants leave being granted is the issue of the pronouncement on matters of theology both in the High Court and the Court of Appeal (Part C). To put in a nutshell, some issues of theology, religious and ecclesiastical concerns are beyond the reach of this court. However, the religious issues before this court and the courts below are not of the same ilk as those found in various authorities such as *Meor Atiqulrahman Ishak & Ors v. Fatimah Sihi & Ors* [2006] 4 CLJ 1; [2006] 4 MLJ 605, and *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1 and other related cases. This is because the subject matter of the above named cases are well within the court's competence and are thus justiciable. [89-91].

[245] In short this court does not decline to decide cases relating to other normal legal issues such as commence or banking laws, or civil rights and the like, just because there is a religious element in them. It all depends on the facts of each case.

[246] However in this case, the subject matter has escalated to a worrying level. The learned judges in the court below ought to have confined themselves strictly to the legal issues raised, since the question of the truth or otherwise of the disputed tenets of religious belief and faith, the correctness or otherwise of religious practices and inward beliefs and allegiances, are all beyond the competence of judges of fact and law, as we are. The questions are clearly non justiciable because they are neither questions of law nor are they questions of fact or factual issues capable of proof in a court of law by admissible evidence. (See *Mohinder Singh Khaira & Ors v. Daljit Singh Shergill & Ors* [2012] EWCA Civ 983).

[247] As is well known, judicial method is equipped to handle only with objectively ascertainable facts, directly or by inference and from evidence which is probative. In my view, judges should not overreach themselves for we are not omniscient.

[248] The alleged historical or other facts taken from affidavit evidence and the internet are in themselves unverified, uncorroborated and therefore inadmissible. As had been said, plausibility should not be mistaken for veracity.

[249] Thus, my view is that leave should be granted for the questions in Part C under s. 96(a) for it would be to public advantage that the issues are ventilated and the matter placed in their correct and proper perspectives for purposes of future guidance.

[250] Finally, I really and sincerely take the position that in this case, the voice of reason should prevail and all parties must exercise restraint and uphold the tenets of their respective religious beliefs and display tolerance and graciousness to each other. All parties should stay calm and exist in peace and harmony in our beloved country. It is imperative that the goodwill that all races and religious denominations posses be brought to the negotiating table and the matter be resolved amicably.

[251] The wise words of Lord Justice Mummery in *Mohinder Singh Khaira* (*supra*) may be heeded. His Lordship observed that:

> … the parties here would be well advised to engage in some form of alternative resolution procedure.

Conclusion

[252] For the reasons above, the applicant has satisfied the requirements for leave to be granted under s. 96(a) of the CJA.

[253] Finally as have always been said, judicial review of administrative action is an essential process if the rule of law is to mean anything at all.

[254] In this, it is only right that the apex court should have the last say on the subject. Moreover, issues of public importance that this case has thrown up cannot be understated. They have to be addressed and resolved, for otherwise the uncertain position of various legal principles in the Court of Appeal remain unclarified and uncorrected.

[255] Thus, leave to appeal should be granted on the proposed questions in Part A and C as prayed for in encl. 2(a) and consequential orders should follow.

[256] There should be no order as to costs.

Jeffrey Tan FCJ (dissenting):

[257] Section 96 of the Courts of Judicature Act 1964, which governs the instant application for leave to appeal to the Federal Court, is most clearly and unambiguously worded. It provides:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction; involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[258] Where the prerequisites of sub-s. (a) or (b) are satisfied, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court. Needless to say, where the prerequisites are satisfied, leave to appeal could not be refused. That translates, that the task of this court, in relation to the instant application or indeed any application for leave to appeal, is only to find if the prerequisites of sub-s. (a) or (b) have been met. At the stage of application for leave, the task of this court is no more involved than that. At the stage of application for leave, there should not be a rush to judgment of the issues and its merits, which, in the instant case, have yet to be canvassed and argued.

[259] Pertinent to the prerequisites of s. 96 are the following facts. By letter dated 7 January 2009, the Ministry of Home Affairs Malaysia informed the applicant that the applicant's publication permit was subject to the conditions, namely (i) that the applicant was prohibited from using the word "Allah" in the Herald – The Catholic Weekly, and, (ii) that the word "Terhad", which conveys the meaning that circulation of the publication is restricted to churches and to Christians only, be printed on the front of the Herald – The Catholic Weekly, until the court has decided on the matter.

[260] By way of an application for judicial review, the applicant applied to quash condition (i) only. Further and or alternatively, the applicant also applied for declarations to declare that the applicant had the constitutional right, pursuant to arts. 3(1), 10, 11 and 12 of the Federal Constitution, to use the word "Allah" in the Herald – The Catholic Weekly, and that the Printing Presses and Publications Act 1984 did not empower the respondents to impose condition (i) which was *ultra vires* the Printing Presses and Publications Act 1984 ('Act 301').

[261] Basically, the first and second respondents justified and defended condition (i) on the ground that it was necessary to avoid any confusion amongst religions and to assuage the religious sensitivities of the people which could threaten the security and peace of the nation. In para. 46 of his opposing affidavit dated 6 July 2009, the Minister elaborated on that ground as follows:

A "Saya selanjutnya menyatakan bahawa penggunaan kalimah "Allah" berterusan oleh pemohon boleh mengancam keselamatan dan ketenteraman awam kerana ianya boleh membangkitkan kekeliruan di kalangan umat Islam. Ini adalah kerana walaupun pemohon mendakwa kalimah "Allah" yang digunakan di dalam penerbitannya
B merupakan terjemahan perkataan 'God' tetapi di kalangan rakyat Malaysia, kalimah "Allah" secara matannya merujuk kepada Tuhan Yang Maha Esa bagi penganut agama Islam". The first and second respondents contended that condition (i) had not infringed the constitutional right of the applicant, be it under arts. 3, 10, 11 or
C 12 of the Federal Constitution.

[262] At the conclusion of the hearing, the High Court quashed condition (i) and declared that the applicant had the constitutional right, pursuant to arts. 3(1), 10, 11 and 12 of the Federal
D Constitution, to use the word "Allah" in the Herald – The Catholic Weekly.

[263] However, those orders were set aside on appeal. The Court of Appeal held that condition (i) was valid and lawful
E (per Abdul Aziz Abdul Rahim JCA) and that the Minister had not acted in any manner or way that merited judicial interference (per Mohamed Apandi Ali JCA, as he then was). Both JJCA held that condition (i) was an exercise of an administrative discretion under Act 301, that the imposition thereof, which was made after
F consideration of all relevant factors, was not an arbitrary act (per Mohamed Apandi Ali JCA, as he then was) and or was within the perimeters of Act 301 (per Abdul Aziz Abdul Rahim JCA), and that condition (i) could not therefore be struck down as unreasonable and/or unlawful.

G **[264]** With respect to the declarations by the High Court on the constitutional right of the applicant, both JJCA held that art. 3(1) justified the existence of art. 11(4), and that art. 11(4) in turn empowered the enactment of State laws to curb the propagation of other religions to followers of Islam. Abdul Aziz Abdul Rahim
H JCA furthermore observed that the Herald – The Catholic Weekly, which was accessible 'online', could be read by both Muslims and non-Muslim, while Mohamed Apandi Ali JCA explicated that it is unlawful to propagate other religions to followers of Islam.

I

[265] On the basis of the above irrefragable facts, it is evident that at each and every stage that condition (i) had been first considered and then reviewed, by the Minister who imposed it, by the High Court who set it aside, and by the Court of Appeal who upheld condition (i), there were questions and/or issues on the constitutionality of condition (i). It is equally evident that those constitutional questions/issues were either defended and justified by the Minister and answered by the courts on the basis of the provisions of the Constitution and its effect. The High Court and the Court of Appeal might have reached different results. But it remains all the same that were clearly decisions by the courts below on the effect of the provisions of the Constitution. Section 96(b) of the CJA has only one prerequisite - "from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision". It is plain and obvious that the sole prerequisite of s. 96(b) has been satisfied.

[266] The constitutional questions should be answered by the Federal Court. They are too grave to be answered by any other. I would therefore grant leave for the constitutionality of condition (i) to be raised in an appeal to the Federal Court.

[267] Lastly I wholly associate myself with the observation of His Lordship CJSS at para. 109 of his judgment.